No. 91-2059

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In The

Supreme Court of the United States

October Term, 1991

CEDARMINN BUILDING LIMITED PARTNERSHIP, MINNCEDAR LAND LIMITED PARTNERSHIP, ROCKMINN LEASING CORPORATION and MIDUNITED BUILDING COMPANY,

Petitioners,

vs.

RESOLUTION TRUST CORPORATION, as Receiver for Midwest Saving Association, F.A.,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

The Financial Institutions Reform, Recovery and Enforcement Act of 1989 ("FIRREA"), 12 U.S.C. §1821(e)(2), provides that the "conservator or receiver appointed for any" insolvent bank or savings and loan "shall determine whether or not" to repudiate "burdensome" leases and contracts "within a reasonable period following such appointment." The questions here presented are:

1. Whether the "reasonable period following such appointment" (a) is to be calculated from the date of the initial appointment of either the conservator *or* receiver, or (b) is independently revived and runs anew upon each successive appointment of multiple conservators and receivers.

2. Whether the lapse of more than fourteen months between the appointment of the Resolution Trust Corporation ("RTC"), as *both* a conservator *and* receiver, and its repudiation of "burdensome" leases constitutes a "reasonable period" under §1821(e)(2), when the "burdensome" nature of the leases was determined and known by the RTC throughout that period.

3. Whether an undated, unsigned, unpromulgated, unpublished, internal "Statement of Policy" of the RTC, revealed for the first time as an unauthenticated, non-record addendum to the RTC's Eighth Circuit appellate brief, should be given *Chevron* "deference" in determining the meaning of §1821(e)(2).

4. Whether a timely and valid repudiation, in addition to limiting the liability of the conservator or receiver under §1821(e)(4), also extinguishes property interests in collateral mortgages and independent, third-party Federal Home Loan Bank letters of credit that secure lease obligations, without regard to (a) the provisions of §§1821(e)(11) and (e)(13) which expressly preserve such security interests, or (b) the Takings Clause of the Fifth Amendment.

LIST OF PARTIES

The names of all parties to the instant proceeding are set forth in the caption of the within Petition. The petitioners are all non-public limited partnerships and are neither subsidiary nor parents to any corporate entities, eliminating any need for a Rule 29.1 listing.

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Petitioners,

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RESOLUTION TRUST CORPORATION, as Receiver for Midwest Savings Association, F.A.,

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On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

PETITION FOR WRIT OF CERTIORARI

Petitioners Cedarminn Building Limited Partnership, Minncedar Land Limited Partnership, Rockminn Leasing Corporation and Midunited Building Company (collectively, "Cedarminn") respectfully pray that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Eighth Circuit entered in the above-captioned matter on February 18, 1992, rehearing denied on March 27, 1992.

OPINIONS BELOW

The February 18, 1992, opinion of the United States Court of Appeals for the Eighth Circuit is reported at 956 F.2d 1446, and is reprinted in the Appendix at 2a. The United States District Court for the District of Minnesota filed a Memorandum and Order dated March 4, 1991 (26a), an Order dated April 25, 1991 (61a), and a Memorandum and Order dated May 23, 1991 (68a).

JURISDICTION

The decision of the United States Court of Appeals for the Eighth Circuit was rendered on February 18, 1992 (2a). A timely Petition for Rehearing and Suggestion for Rehearing *En Banc* was denied on March 27, 1992 (la). This petition for a writ of certiorari is filed within ninety days after that denial. This Court's certiorari jurisdiction is invoked pursuant to 28 U.S.C. §1254(1).

STATUTORY PROVISIONS

The relevant statutory provisions (12 U.S.C. §§1821(e)(1) - (4), (e)(11) and (e)(13)) are set forth at 110a-113a.

STATEMENT OF THE CASE

A. The Relevant Facts

In 1985 and 1986, petitioners and Midwest Federal Savings & Loan Association ("Midwest Federal") entered into two "sale/ leaseback" transactions through which petitioners purchased nineteen of Midwest Federal's branch offices and leased the branches to Midwest Federal under five long-term lease agreements (the "Leases"). As security, and to unconditionally and

irrevocably guaranty the tenant's obligations under the Leases, petitioners were provided with two independent, third-party Letters of Credit totalling $11.8 million issued by the Federal Home Loan Bank of Des Moines (the "FHLB Letters of Credit") and were also collaterally assigned Midwest Federal's interests in certain mortgages on the land (the "Collaterally Assigned Mortgages"). The Leases entitled petitioners to look to the FHLB Letters of Credit and Collaterally Assigned Mortgages for any "default," which was defined as the failure to pay rents or other obligations under the Leases, or any "notice (whether written or oral) of tenant's intent not to perform any or all of tenant's obligations under t[he] lease."

On February 13, 1989, Midwest Federal was declared insolvent and the Federal Savings and Loan Insurance Corporation ("FSLIC") was appointed as its conservator (the *first conservatorship)*. As is commonly done in such cases, on May 4, 1989, Midwest Federal was placed into a "pass-through" receivership, with FSLIC appointed as its receiver (the *first receivership)*, to oversee the liquidation of the institution. Under this arrangement, all of its assets, operations, branches, deposits, employees, and the Leases in question, were simultaneously "passed through" to a newly-created FSLIC successor entity, Midwest Savings Association ("Midwest Savings"). Midwest Savings was simultaneously placed into a new conservatorship, with FSLIC appointed as its conservator (the *second conservatorship).*

On August 9, 1989, Congress enacted the Financial Institutions Reform, Recovery and Enforcement Act of 1989 ("FIRREA"), amending, among other things, the Federal Deposit Insurance Corporation Act ("FDIC Act"), 12 U.S.C. §§1811, *et seq*. Congress deemed FIRREA "emergency legislation" for the "expedited resolution of the monumental problems involved with...hundreds of insolvent thrifts..." S. Rep. No. 19, 101st Cong., 1st Sess. at 3 (1989); H.R. Rep. No. 101-54(I), 101st Cong.,

1st Sess. at 308, *reprinted in* 1989 *U.S. Code Cong. & Admin. News* 86, 104 (1989). The Resolution Trust Corporation ("RTC") was created by FIRREA (12 U.S.C. §1441a(b)) as a temporary agency (until December 31, 1996) to manage, resolve and liquidate thrift institutions which fail during the three year period following its creation (and any thrifts taken over by the FSLIC since January 1, 1989), using the amended powers of 12 U.S.C. §§1821-1823 of the FDIC Act. *See* 12 U.S.C. §§1441a(b)(3)(A), (b)(4), (b)(6) and (o).

By operation of law under FIRREA (12 U.S.C. §1441a(b)(6)), on August 9, 1989 the RTC automatically succeeded FSLIC in its positions of conservator and receiver in this case. It is undisputed that, regardless of the "hat" it was wearing, for the next fourteen months (through October 1990) the RTC sought to sell and liquidate all of the assets and operations of the institution, continuing FSLIC's liquidation efforts which had commenced in May 1989 (JA 597-98, 599, 600-05, 606-13, 614-17, 618-19, 620-38).[1]

It is also undisputed that, as the Eighth Circuit noted, "Midwest Savings determined at least as early as May 22, 1989" that the leases were burdensome and had "significant detrimental effects" to the institution (24a, n.14). The District Court found, "based upon internal [Midwest Savings] and RTC documents, that RTC [and FSLIC] made the decision as early as June of 1989 that the leases were unduly burdensome and required either modification or repudiation [and that] the decision on repudiation was deferred until October of 1990 while RTC sought to renegotiate the leases, using the threat of repudiation as a leverage over those negotiations" (43a).

On October 5, 1990, the RTC (which was already serving in the dual capacities of conservator of Midwest Savings and receiver of Midwest Federal) was then appointed to its *second receivership*, as

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1. "JA #" refers to the Joint Appendix in the Eighth Circuit.

the receiver of Midwest Savings, for the final resolution and liquidation of the institution. Twenty-four days later, on October 29, 1990, the RTC repudiated petitioners' Leases pursuant to 12 U.S.C. §1821(e) of the FDIC Act. During this twenty-four day period, there was no new information, analysis or determination as to whether the Leases were "burdensome." Rather, the repudiation was based on the previously - made determination by FSLIC and the RTC, throughout the preceding seventeen months (May 1989 to October 1990), that the Leases were "burdensome" and should ultimately be repudiated.

To summarize, the significant events were as follows:

Date	Receivership	Conservatorship
Feb. 13, 1989	—	FSLIC appointed *Conservator No. 1* (of Midwest Federal)
May 4, 1989	FSLIC appointed *Receiver No. 1* (of Midwest Federal) in "pass-through" receivership	FSLIC appointed *Conservator No. 2* (of Midwest Savings) assuming all assets and operations from "pass-through" receivership
May 22, 1989	In memo, FSLIC determines that the Leases were burdensome, had "significant detrimental effects to the association's finances," and should be repudiated or renegotiated (JA 675).	
July 29, 1989	In memo, FSLIC again assesses "scenario for repudiation of the leases" (JA 753).	

Aug. 9, 1989 (FIRREA enacted)	RTC substituted as *Receiver No. 1* (of Midwest Federal)	RTC substituted as *Conservator No. 2* (of Midwest Savings)
Sept. 25, 1989	In memo, assessing repudiation, RTC concludes that, "in the event the leases were repudiated, the [FHLB] letters of credit may *not* be treated as a penalty" (JA 788).	
Dec. 26, 1989	In memo, RTC again acknowledges that Leases are in fact burdensome, and weighs pros and cons of repudiation (JA 829-834).	
Jan. 4, 1990	Two RTC memos again conclude that Leases are burdensome, that "the repudiation scenario would seem to be the most cost effective" (JA777), and that "reasonableness" should be determined from "August 9, 1989, the date FIRREA became law" (JA 838).	
May 17, 1990	RTC memo again assesses the burdens of the Leases, "the uncertainty of successfully repudiating the lease[s]" and "the ability to use the threat of repudiation" (JA 846).	
Oct. 5, 1990	RTC appointed *Receiver No. 2* (of Midwest Savings) on final resolution of institution	—
Oct. 29, 1990	RTC finally repudiates the Leases.	

B. *Proceedings Below*

On October 30, 1990, the RTC filed this action seeking a declaration that its repudiation was timely under §1821(e)(2); that, under §1821(e)(4), petitioners were entitled to no damages as a result of RTC's repudiation; and that, therefore, the FHLB Letters of Credit should be cancelled. On that same date, the RTC obtained an *ex parte* temporary restraining order enjoining petitioners from drawing on the FHLB Letters of Credit securing the Leases. Also on that same date, Cedarminn filed a separate action (which was later consolidated with RTC's action) seeking a declaration that the RTC's repudiation was untimely under §1821(e)(2) and that, in any event, under §§1821(e)(11) and (13), and the Fifth Amendment, petitioners were free to exercise their rights under the FHLB Letters of Credit and the Collaterally Assigned Mortgages due to the repudiation "default" under the Leases.

The District Court had federal question jurisdiction over both consolidated actions pursuant to 12 U.S.C. §1441a(l)(1) (providing that any action to which the "[RTC] is a party shall be deemed to arise under the laws of the United States, and the United States district courts shall have original jurisdiction over such action") and 28 U.S.C. §1331.

On cross-motions for summary judgment filed two months after suit was commenced, the District Court held that the RTC did not act within a "reasonable period" under §1821(e)(2) in repudiating the Leases fourteen months after its August 9, 1989 succession to FSLIC as both conservator and receiver (44a). The District Court specifically rejected the RTC's argument that "its appointment as 'receiver' of [Midwest] on October 5, 1990 revived its otherwise expired ability to repudiate" (42a), holding that "RTC's arguments fly in the face of the language of the statute" (42a).

In so holding, the District Court noted that "the language of

section 1821(e)(2) [w]as 'mandatory, not discretionary'" (38a); that "[i]t is clear that the statute requires either the conservator *or* the receiver, whichever is appointed, to make the repudiation determination within a reasonable period following *its* appointment" (43a); that "FIRREA requires the RTC to make the hard decision whether or not to repudiate...upon appointment of either a conservator *or* receiver" (44a); and that "Congress required the receiver or conservator to make the repudiation decision within a 'reasonable time' following its appointment" (44a). The District Court also noted that repudiation "must be exercised 'consistently with [FIRREA's] design of swiftly bringing order to the chaos of the savings and loan industry'" (40a) given that "a key purpose behind FIRREA was the *expeditious* resolution of the savings and loan crisis" (44a).

The District Court concluded that the "RTC acted unreasonably in deferring the repudiation decision until October of 1990, when it is clear that it [and FSLIC] determined that the leases were unduly burdensome as early as June of 1989, and likely sooner" (44a). However, the District Court held that RTC's untimely and ineffective repudiation did not constitute a "default" so long as the RTC continued to make timely Lease payments, thereby precluding a draw on the FHLB Letters of Credit (55a). As a result, the District Court did not reach the issue of petitioners' collateral or the enforcement of the FHLB Letters of Credit under §1821(e)(11) and (13) or the Fifth Amendment.

The RTC appealed the "timeliness" issue under §1821(e)(2), and Cedarminn cross-appealed on the issue of "default" and enforcement of its interests in the collateral and the independent, third-party FHLB Letters of Credit.[2]

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2. Subsequently, in April 1991, RTC failed to pay the full monthly rents due under the Leases in a timely manner. Petitioners declared RTC in default and, on April 22, 1991, drew on the FHLB Letters of Credit. Under Rule 62(c), Fed. R. Civ. P., the District Court enjoined disposition of the proceeds of the Letters of Credit pending appeal (61a

(continued)

On appeal to the Eighth Circuit, the RTC for the first time advanced a "deference" argument under *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984), based upon a newly-unveiled internal, undated, unsigned, unpromulgated, unpublished, unauthenticated and non-record "Statement" (105a-109a) which the RTC appended to its appellate brief. According to RTC's counsel, this newly-found "Statement" — which the RTC had not relied on in the District Court below or in numerous other cases around the country — purportedly reflected the agency's view that the repudiation right could be revived and renewed from a prior conservator or receiver to a subsequent receiver (108a). Specifically, this purported agency Statement, which addresses a wholly unrelated subject ("Interest on Direct Collateralized Obligations") (105a), contained one sentence in passing, without analysis or authority, that "the subsequent receiver shall have the option to repudiate [a] contract...even if honored by the prior conservator and/or receiver" (108a).[3]

In its decision of February 18, 1992 (2a), finding that §1821(e)(2) was "ambiguous," the Eighth Circuit held that under *Chevron* it "must accede" and defer to RTC's interpretation of §1821(e)(2) in its newly-unveiled Statement (13a). The Eighth Circuit held that "RTC's interpretation of the statute [was] permissible" and that, based on the Eighth Circuit's own analysis of the statute, "RTC's interpretation was the most reasonable interpretation" (23a). The Eighth Circuit concluded that the RTC's repudiation of the Leases within twenty-four days after its last,

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(continued)

and 68a). Petitioners filed timely notices of appeal on the Rule 62(c) orders, which were consolidated with the main appeal. The Eighth Circuit did not address this issue in its decision.

3. Before the Eighth Circuit, petitioners pointed out that the RTC "improperly attached, as Addenda to its Brief and Reply Brief, numerous documents which were not part of the record below, in violation of Rule 10(a), Fed. R. App. P." (Petitioners' Eighth Circuit Reply Br. at 4 n.3). In their Petition for Rehearing, petitioners again objected to the unauthenticated, non-record "Statement" (Petition for Rehearing at 6-10).

successive appointment as a receiver was timely under §1821(e)(2) (25a).

Finally, the Eighth Circuit failed to address the disposition of the proceeds of the independent, third-party FHLB Letters of Credit and the Collaterally Assigned Mortgages which secured the Lease obligations, albeit those questions — central to the case — were the subject of petitioners' cross-appeal, were properly raised before the Eighth Circuit, and were fully briefed in petitioners' brief (at pages 33-36) and reply brief (at pages 15-18), in RTC's reply brief (at pages 18-25), and in petitioners' petition for rehearing (at pages 12-15). Indeed, as for the independent, third-party Letters of Credit issued by the Federal Home Loan Bank, the Eighth Circuit made the clearly erroneous statement that "*Midwest Federal* issued two letters of credit totalling $11.8 million to ensure payment" (7a) (emphasis added).

Based on the Eighth Circuit's clearly erroneous statement that the Letters of Credit were the direct obligations of *Midwest Federal* and its receiver (i.e., the RTC) — as opposed to being independent obligations of a third-party, the Federal Home Loan Bank — the Eighth Circuit failed to address the integrity of the independent, third-party FHLB Letters of Credit and petitioners' other collateral under §§1821(e)(11) and (e)(13), which expressly preserve such security and collateral notwithstanding a repudiation. Rather, the Eighth Circuit addressed the consequences of a timely repudiation by noting only that "[petitioners'] damages [we]re limited to those prescribed under 12 U.S.C.A. §1821(e)(4)" (25a).

In petitioners' petition for rehearing before the Eighth Circuit, petitioners specifically addressed the propriety of *Chevron* "deference" to the purported RTC Statement, called the court's attention to its clearly erroneous statement regarding the FHLB Letters of Credit, and pointed out that the Eighth Circuit had failed to address the disposition of the proceeds of the FHLB Letters of

Credit and other collateral, which were central to the case. Rehearing was denied by the Eighth Circuit without comment on March 27, 1992 (1a).

REASONS FOR GRANTING THE WRIT

I.

THE ISSUES IN THIS CASE WARRANT IMMEDIATE CONSIDERATION BECAUSE THEY ARE TODAY AT THE HEART OF THE NATION'S SAVINGS AND LOAN CRISIS AND CANNOT AWAIT FURTHER DEVELOPMENT BY THE CIRCUITS.

This Court is well aware of the vast, nationwide crisis stemming from the collapse and failure of many federally-insured financial institutions. In response to that crisis, Congress passed the Financial Institutions Reform, Recovery and Enforcement Act ("FIRREA") in August 1989. As the Senate Banking Committee observed, this constituted "emergency legislation...at a time of crisis in the Federal deposit insurance system and the thrift industry," and that the President had "made reform and recapitalization of the deposit insurance system a top priority of his administration." S. Rep. No. 19, 101st Cong., 1st Sess. at 3 (1989); *see* App. at 25a, n.15. Similarly, the House Report noted that FIRREA was intended to provide "an expedited resolution" of the banking and savings and loan crisis. H.R. Rep. No. 101-54(I), 101st Cong., 1st Sess. at 308, *reprinted in* 1989 *U.S. Code Cong. & Admin. News* 86, 104 (1989).

FIRREA provided for resolution of outstanding and anticipated failures of savings associations by temporarily creating and directing a new agency, the Resolution Trust Corporation ("RTC"), to assume the management, sale and liquidation of the assets of these failed associations. But the RTC and its functions are

of limited and temporary duration. Through December 31, 1996, the RTC is authorized to manage and resolve only those institutions which fail during a three-year period, from August 9, 1989 (the date of FIRREA) to August 9, 1992, and any institution that had been taken over by its predecessor, FSLIC, after January 1, 1989. 12 U.S.C. §§1441a(b)(3)(A), (b)(4), (b)(6) and (o).

Thus, time is of the essence in resolving the important issues raised by the actions of the RTC in this case. To date, the RTC's actions have affected and will continue to affect a vast number of institutions and thousands of parties who, like petitioners, entered into transactions with now-failed institutions prior to their insolvency. Indeed, the RTC's own statistics presented to the Eighth Circuit demonstrate the staggering amount of assets and transactions at stake. From the RTC's inception until January 31, 1991 alone, over 200 institutions with assets exceeding $150 billion were taken over by the RTC, with billions of dollars in leases, contracts, letters of credit and other collateral affected by the RTC's exercise of the repudiation powers at issue in this case (*see* RTC's Eighth Circuit Brief at 7 and RTC's Appendix A). Moreover, the same repudiation powers are used by the FDIC with respect to failed banks and, therefore, the billions of dollars in leases and contracts affected by this issue include the numerous failed banks which are being, and will be, taken over and resolved by the FDIC.

As the RTC informed the Eighth Circuit, "[t]his case presents an important question ... because the answer will have enormous impact on federal receivership powers" (*Id.* at 1), concerning "one of the most important powers Congress granted" (*Id.* at 5), and that "[t]he issue is one of pure statutory interpretation" (*Id.* at 20). As the RTC told the Eighth Circuit, the issue,

> is one of first impression with importance well beyond this particular case; conservators having been appointed for literally hundreds of

> savings institutions. In many instances, the conservators have already been replaced by receivers. It is very likely that most, if not all, of the remaining conservators will be ultimately replaced by receivers [who will then repudiate vast number of leases]. (RTC's Eighth Circuit Brief at i).

These factors, including the short life-span of the RTC — during which its actions will substantially and permanently affect thousands of private parties having leases and contracts with failed institutions, as well as the nation's economy as a whole — combine to demand and justify a definitive consideration by this Court of the important issues here involved. Because of the urgency and the speed with which these issues have developed, there are no other Court of Appeals decisions on these issues, although there are several District Courts that have reached results which directly conflict with the Eighth Circuit's decision, as discussed below.

Given the gravity and immediacy of the savings and loan crisis, there simply is no time to await possible development of Circuit conflicts. The Eighth Circuit's decision is being widely cited by the government as the definitive statement on the meaning of §1821(e)(2). The time for review by this Court to resolve these important national issues is now.

II.

THE EIGHTH CIRCUIT'S READING OF THE "CONSERVATOR OR RECEIVER" AND "REASONABLE PERIOD" PROVISIONS OF §1821(e)(2) IGNORES THE PLAIN LANGUAGE OF THE STATUTE AND RAISES IMPORTANT ISSUES OF STATUTORY CONSTRUCTION.

The core holding of the Eighth Circuit is as follows: Because §1821(e)(1) permissively authorizes that the "conservator or receiver ... may disaffirm or repudiate any [burdensome] contract or lease," the statutory *insistence* in §1821(e)(2) — that the "conservator or receiver appointed for" an institution "*shall determine whether or not*" to repudiate "within a reasonable period following such appointment" — permits independent, separate, successive and revived "reasonable periods" for any number of successive conservators or receivers in which to make the determination "whether or not" to repudiate, as directed by Congress. Superimposed on this holding is the undisputed fact that, in its various capacities as conservator and receiver over seventeen months, the RTC (and its predecessor FSLIC) had determined that the Leases in this case were "burdensome" and that repudiation would be necessary.

Given the plain language of the statute, the Eighth Circuit's holding gives rise to the following issues:

1. The plain language of Section 1821(e)(2) is written as a *mandatory disjunctive*, in that it directs that *either* the "conservator *or* receiver," whichever is appointed, "*shall determine* whether or not" to repudiate "within a reasonable period after such appointment." However, the Eighth Circuit's decision has construed the statute in the *conjunctive* by holding that *both* the conservator *and* receiver have separate, successive and

independently revived "reasonable periods" for repudiation. The Eighth Circuit's holding also ignores the "*shall determine*" directive in §1821(e)(2), and holds that the conservator and receiver *may* both repudiate within a reasonable period after each is appointed. The Eighth Circuit's holding thus ignores the plain language of the section read in its entirety. *The Rechler Partnership v. RTC*, 1990 U.S. Dist. LEXIS 18714 at *22 (D.N.J. 1990) (unreported) ("RTC cannot choose its own pragmatic middle path ... It must act and it must live with the consequences of its actions ... RTC's policy of avoidance directly contradicts this express statutory responsibility"); *RTC v. United Trust Fund. Inc.*, 775 F. Supp. 1465, 1469 (S.D. Fla. 1991) ("nothing in the statute suggests that RTC has 'multi-opportunities' to repudiate. The statute only speaks of one opportunity"); *701 NPB Associates v. FDIC*, 779 F. Supp. 1336, 1339 (S.D. Fla. 1991) ("'reasonable period' limitation" begins to run with FDIC's first appointment).

2. The Eighth Circuit's decision permits repudiation within a "reasonable period" after the final resolution of an institution, i.e., after appointment of the final, successive receiver. However, the statute does not permissively give the RTC (or FDIC) the luxury of waiting until after final resolution, but rather imposes a "reasonable period" obligation at the beginning of the process, requiring and directing an agency determination "whether or not" to repudiate within a reasonable period after appointment of a "conservator or receiver." *See The Rechler Partnership v. RTC, supra*, at LEXIS *16, *22 ("RTC's interpretation, that the decision to affirm or repudiate cannot be made until the institution has been resolved, directly contradicts the statutory language and scheme," and "it is clear that the reasonable time cannot be tied to resolution"); *RTC v. United Trust Fund, Inc., supra*, 775 F. Supp. at 1468 ("the RTC frequently appoints conservators, receivers, new conservators, and new receivers" and "[t]o sustain the RTC's position that each time a new conservator and/or receiver [i]s appointed the time period begins anew would allow the RTC to repudiate a lease at any time it

wanted to, in direct contravention of 12 U.S.C. §1821(e)(2)").

3. Under its holding, the Eighth Circuit itself recognized "that RTC could prolong indefinitely the repudiation decision" (19a), but was unmoved by this incongruous result. Thus, by permitting the revival of successive "reasonable periods" within which to repudiate, the Eighth Circuit's decision makes the statutory directive a virtual nullity, and extends the repudiation "reasonable period" on an open-ended basis. However, Section 1821(e)(2) provides a "reasonable period" time restriction on the agency's exercise of its repudiation power. The Eighth Circuit's decision thus transforms a statutory directive and *restriction* on agency action into an unlimited *license* to forestall and delay a repudiation determination indefinitely. *See The Rechler Partnership v. RTC, supra*, at LEXIS *22 ("[The] RTC must act and it must live with the consequences of its actions whether they be good, bad or inconvenient"); *RTC v. United Trust Fund, Inc.*, 775 F. Supp. at 1469 ("Congress mandated a 'reasonable period' to exercise repudiation not for the benefit of the RTC, but for the benefit of lessors, property owners and the public in general ... to limit the duration of the[ir] uncertainty").[4]

4. Although the Eighth Circuit referenced (15a-16a) numerous other sections of the FDIC Act, as amended by FIRREA, which give *permissive* authority to a "conservator or receiver," the Eighth Circuit failed to consider the only other provision of the FDIC Act which imposes a mandatory *time restriction* from the *appointment* of a conservator or receiver. That is, the Eighth Circuit ignored the analogous statute of limitations in 12 U.S.C. §1821(d)(14)(B)

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4. The Eighth Circuit also ignored the legislative history that Congress initially proposed a strict 90-day period within which to repudiate, H.R. Rep., *supra*, 1989 *U.S. Code Cong. & Admin. News* at 127. Although this 90-day period was replaced by a "reasonable period" to give some flexibility, "it does give the court some indication of the time frame that Congress was considering." *RTC v. United Trust Fund, Inc.*, 775 F. Supp. at 1468.

which provides that the RTC's limitations period in which to assert a tort claim (3 years) or contract claim (6 years) "begins to run on ... the date of the *appointment* of the corporation as *conservator or receiver.*" Under the Eighth Circuit's approach, the RTC could, apparently, revive multiple, successive, independent and renewable limitations periods, destroying the very concept of limitations and repose, which the statute does not suggest and which Congress could not have intended. *See Patterson v. Shumate*, No. 91-913, ___U.S.___, ___ n.2 (June 15, 1992) (consistency of statutory provisions in same statute should be presumed).

5. The Eighth Circuit sought to rely on pre-FIRREA cases from the 1930's (18a, 21a-22a). However, these cases failed even to address the specific issue of "reasonable time" or successive, reasonable periods for repudiation, and it is doubtful that the Court should assess the meaning of 1989 emergency legislation by the historical analysis of fifty-year-old cases that did not address or consider the issue, and which are not cited in the legislative history.

III.

THE EIGHTH CIRCUIT'S DECISION IS IN CONFLICT WITH THIS COURT'S DECISIONS AS TO WHAT CONSTITUTES AN "AGENCY INTERPRETATION" TO WHICH *CHEVRON* DEFERENCE CAN BE GIVEN.

In holding that the RTC's repudiation of petitioners' Leases had been effected within a "reasonable time" under §1821(e)(2), the Eighth Circuit held that, under *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842-43 (1984), the court was required to "accede" and defer to what it characterized as the RTC's "agency interpretation" of §1821(e)(2) (13a). That holding is directly contrary to the teachings of this Court in *Chevron* and *Bowen v. Georgetown Univ. Hospital*, 488 U.S. 204, 212 (1988). The purported agency interpretation relied on by the Eighth

Circuit consisted of an undated, unsigned, unpromulgated, unpublished and unreported "Statement of Policy Regarding the Payment of Interest on Direct Collateralized Obligations" (the "Statement") (105a-109a), submitted for the first time as an unauthenticated, non-record addendum to RTC's Eighth Circuit appellate brief. There are substantial problems in elevating this "Statement" to the level of a "formal agency interpretation" to which "deference" could be granted under *Chevron*:

1. The RTC, a temporary agency, has no enforcement statute of its own, has been given only temporary authority to exercise the powers under 12 U.S.C. §§1821-23 of the FDIC Act, and has been delegated no authority to construe the FDIC Act or any other statute (*see* 12 U.S.C. §1441a(b)(10)-(12)). Thus, the very rationale of *Chevron* — "legislative delegation to an agency" and deference to an agency's "construction of a statutory scheme it is entrusted to administer" (467 U.S. at 844) — is simply missing in this case. [5]

2. The unsigned Statement is unauthenticated and gives no indication as to its authorship or origins. It does not even purport to have been issued by RTC's Board of Directors, or reviewed and approved by the Oversight Board, nor does it purport to "implement" the "Strategic Plan of the Oversight Board." The Statement thus fails to satisfy the statutory requirements imposed on the RTC for an agency rule, regulation or policy statement under 12 U.S.C. §1441a(b)(12)(A), and fails again to fall within the rationale of *Chevron* permitting deference to an "interpretation

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5. Section 1821(e) is part of the FDIC Act, and the FDIC — not the RTC — is the agency with express delegated authority to construe the FDIC Act (*see* 12 U.S.C. 1819(a)(10)).

6. Congress provided the RTC with limited rulemaking authority, under §1441a(b)(12)(A), only to "adopt the rules, regulations, standards, policies, procedures, guidelines and statements" which were "necessary to implement" or "necessary or appropriate to carry out" the "strategic plan established by the Oversight Board."

made by the administrator of an agency" (467 U.S. at 844).[6]

3. In addition to not being reviewed or approved by RTC's Oversight Board, the Statement was not promulgated pursuant to the requirements of the Administrative Procedure Act, also as required by RTC's enabling statute, 12 U.S.C. §1441a(b)(12)(B), and therefore was not formal agency action within the rationale of *Chevron*.[7]

4. By its own terms, the purported agency Statement is not an "interpretation" of §1821(e)(2), but rather purports to set forth a wholly unrelated policy regarding "Payment Of Interest On Direct Collateralized Obligations" (105a), having nothing to do with the issues in this case. The single sentence in this otherwise irrelevant Statement relied on by the RTC and the Eighth Circuit consists of an isolated remark, with no analysis or citation, that "the receiver shall have the option to repudiate [a] contract ... even if honored by the prior conservator and/or receiver" (108a).

Thus, the agency "Statement" at issue completely fails to satisfy the agency's own statutory requirements, and fails to rise to the level of a "formal agency interpretation" entitled to deference under *Chevron*, 467 U.S. at 840. Indeed, this Court has never given *Chevron* "deference" to a purely internal, interpretive agency memorandum that does not embody formal agency action under its own enabling statute, as was accepted by the Eighth Circuit in this case. As noted in *Bowen v. Georgetown Univ. Hospital*, 488 U.S.at 212, this Court "h[as] never applied the principle of [*Chevron*] to agency litigating positions that are wholly unsupported by

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7. Section 1441a(b)(12)(B) mandates that any RTC rules, regulations, standards, policies, guidelines and statements "(i) *shall* be provided by the [RTC] to the Oversight Board ... (ii) *shall* be subject to the review of the Oversight Board ... [and] (iii) *shall* be promulgated pursuant to subchapter II of chapter 5 of Title 5 [the Administrative Procedure Act]." RTC's purported agency "Statement" in this case met none of these statutory requirements.

regulations, rulings or administrative practice." Rather, this Court has applied *Chevron* to "defer" to an agency interpretation only when the interpretation is embodied in a formal rule or regulation, *Pauley v. Bethenergy Mines. Inc.*, 501 U.S. _____(1991); *Rust v. Sullivan*, 500 U.S. _____(1991); reflects a formal, long-standing, published agency interpretation applied by the agency in numerous prior cases, *Young v. Community Nutrition Institute*, 476 U.S. 974 (1986); *Federal Deposit Ins. Corp. v. Philadelphia Gear Corp.*, 476 U.S. 426 (1986); or was promulgated in formal agency adjudicatory proceedings, *Pension Benefit Guaranty Corp. v. LTV Corp.*, 496 U.S. 633 (1990); *Fort Stewart Schools v. Federal Labor Relations Auth.*, 495 U.S. 641 (1990).[8]

The internal, informal Statement relied on by the RTC and "acceded" to by the Eighth Circuit is what this Court in *Bowen*, 488 U.S. at 212, characterized as "counsel's *post hoc* rationalization," holding that "[d]eference to what appears to be nothing more than an agency's convenient litigating position [is] entirely inappropriate." *Id.* The *post hoc* nature of RTC's reliance on the purported Statement is demonstrated by the fact that this supposed "agency interpretation" was not submitted, mentioned or relied on in the District Court below, but, rather, remained undiscovered until

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8. As noted in Sunstein, *Law and Administration After Chevron*, 90 Colum. L. Rev. 2071, 2093-94 and n.106 (1990):

> [The agency] is not entitled to deference if it did not exercise rulemaking power ....
>
> Thus, for example, an agency that has been given power to make rules, but that simply announces a view one way or another without going through the rulemaking process, would not receive deference ....
>
> *Chevron* applies only when an agency is exercising the power to make rules or otherwise carrying out legislatively delegated interpretive authority.

it was unveiled for the first time in the RTC's brief before the Eighth Circuit. Indeed, the RTC has argued the §1821(e)(2) repudiation issue in numerous other actions around the country without reliance on, or even mention of, the purported agency Statement.

The Eighth Circuit's reliance on *Chevron* to support its decision to defer to the RTC's unpromulgated "Statement" conflicts with this Court's decisions, and improperly enlarges the definition of an "agency interpretation" under *Chevron* and *Bowen* and should, therefore, be reviewed by this Court.

IV.

IMPORTANT STATUTORY AND CONSTITUTIONAL ISSUES STEM FROM THE EIGHTH CIRCUIT'S REFUSAL TO CONSIDER THE IMPACT OF THE LEASE REPUDIATION ON PETITIONERS' COLLATERAL MORTGAGES AND INDEPENDENT, THIRD-PARTY LETTERS OF CREDIT.

Integral to the repudiation issue is the disposition of the collateral and independent, third-party Letters of Credit which frequently secure lease and other contract obligations of now-failed institutions. Thus, the resolution by this Court of the statutory and constitutional consequences of a repudiation will have nationwide impact on thousands of secured parties whose leases and contracts have been, or will be, repudiated by the RTC or FDIC.

A central issue in this case involved the disposition of the independent, third-party Letters of Credit issued by the Federal Home Loan Bank — an entity wholly independent of Midwest Federal and the RTC — and the Collaterally Assigned Mortgages, securing the tenant's obligations under the leases. The RTC argued that, under §1821(e)(4), an effective repudiation limits the liability of Midwest's receiver and, therefore, should also limit the landlord's damages and recourse against any collateral or Letters of

Credit securing the leases. Petitioners argued that, even with a timely and effective repudiation, §1821(e)(4) was inapplicable because it limits only the direct liability of the receiver, does not limit recourse against collateral or third-party letters of credit, and that §1821(e)(11) and (e)(13), and the Fifth Amendment, expressly preserve any such collateral and extensions of credit by the Federal Home Loan Bank against a repudiation. The District Court held that it need not resolve these issues in light of its holding that the repudiation was untimely and ineffective.

The Eighth Circuit, reversing, held that the repudiation was timely and effective, but failed to address and resolve the impact of such a repudiation on the collateral and the independent, third-party Federal Home Loan Bank Letters of Credit. On this subject, the Eighth Circuit erroneously stated that "*Midwest Federal* issued the letters of credit" (7a) (emphasis added) and, therefore, (a) incorrectly believed that the Letters of Credit were direct obligations of Midwest and the Midwest receiver, the RTC, and (b) failed to understand that the Letters of Credit were independent obligations of an unrelated third-party, the Federal Home Loan Bank (not Midwest). Having incorrectly stated that the Letters of Credit were obligations of Midwest Federal's receiver, the RTC, the Eighth Circuit failed to address the issues under §1821(e)(11) and (13), and its sole statement on the consequences of the repudiation was only that "[petitioners'] damages are limited to those prescribed under 12 U.S.C.A. §1821(e)(4)" (25a).

While the RTC is now citing the Eighth Circuit's decision for the proposition that a timely, effective repudiation extinguishes collateral, security and letters of credit, except as permitted by 1821(e)(4), there is substantial conflict and confusion among the district courts regarding this important issue. *See FDIC v. United States Trust Company*, 1992 U.S. Dist. LEXIS 8000 (D. Mass. May 12, 1992) (unreported) (lessor's rights against third-party letter of credit are unaffected by FDIC's effective repudiation and

§1821(e)(4), given that letter of credit is "independent" of claims under the underlying contract); *First National Bank of Chicago v. Unisys Finance Corporation*, 779 F. Supp. 85, 87 (N.D. Ill. 1991) (timely RTC repudiation limited lessor's rights in security to only those damages permitted by §1821(e)(4), notwithstanding §1821(e)(11) which prohibits avoidance of such security interests).

Any loss of petitioners' property interests in the independent, third-party FHLB Letters of Credit and in the Collaterally Assigned Mortgages would be in direct conflict with the plain language of §§1821(e)(4), (e)(11) and (e)(13). If there is a timely, effective repudiation, §1821(e)(4) provides only that "*the conservator or receiver shall not be liable for any damages* (other than [rent as of the date of repudiation]) for the disaffirmance or repudiation of a lease" (emphasis added). Thus, §1821(e)(4) merely limits the *direct liability* of the conservator or receiver on a claim for damages (*e.g.*, under 12 U.S.C. §§1821(d)(3)-(13), providing for such a "claims procedure"). However, §1821(e)(4) does not provide that all damages and all remedies are thereby extinguished, or that all third-party obligations or guarantees which are related to the repudiated lease are also extinguished. Thus, petitioners' rights against the Collaterally Assigned Mortgages and the independent, third-party obligations of the FHLB under the Letters of Credit are not terminated or affected by anything in §1821(e)(4).

Indeed, this result is expressly prohibited by §1821(e)(11) which provides that "[n]o provision of [§1821(e)] shall be construed as permitting the avoidance of any legally enforceable or perfected security interest . . . ." *See* H. R. Rep., *supra*, 1989 *U.S. Code Cong. & Admin. News* at 213 ("[t]he rights of holders of perfected security interests are protected"). Similarly, with respect to the Letters of Credit issued by the Federal Home Loan Bank, §1821(e)(13) provides that "[n]o provision of §1821(e)] shall apply with respect to...[a]ny extension of credit from any Federal home

loan bank...."[9]

Moreover, construing §1821(e)(4) as extinguishing petitioners' property interests in the independent FHLB Letters of Credit and other collateral would result in an unconstitutional taking of petitioners' property for public use — reducing the government's cost in resolving the failed institution — without just compensation. This Court has repeatedly held that extinguishing or precluding enforcement of a lien or security interest is a taking of property in violation of the Fifth Amendment. *See, e.g., United States v. Security Industrial Bank*, 459 U.S. 70, 75 (1982) (bankruptcy court's discharge of bank's security interest under Bankruptcy Code constituted unconstitutional taking); *Armstrong v. United States*, 365 U.S. 40, 44 (1960) (supplier's lien was "property" for purposes of Fifth Amendment). The Letters of Credit are similarly property, given that they are transferable and assignable, independent obligations of the issuing bank, the FHLB. *See Ruckelshaus v. Monsanto Co.*, 467 U.S. 986, 1003 (1984) (property under Fifth Amendment includes intangible "group of rights"). Indeed, if §1821(e)(4) is applicable to extinguish the collateral and Letters of Credit, FIRREA would expressly preclude any compensation for the loss. *See United States v. Riverside Bayview Homes. Inc.*, 474 U.S. 121, 127-28 (1985) (taking by

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9. To the extent §1821(e)(4) is read to deprive petitioners of their independent recourse against the FHLB Letters of Credit securing the Leases, the decision is not only at war with the plain language §§1821(e)(11) and (13), but is also inconsistent with long-standing tenets of commercial, letter of credit law. Letters of credit serve as reliable, predictable, wholly independent obligations of the issuing bank, separate from the underlying contract or obligations of the contracting party. *See, e.g., Atlas Mini Storage, Inc. v. First Interstate Bank of Des Moines, N.A.*, 426 N.W.2d 686, 687-88 (Iowa Ct. App. 1988); *Bank of Newport v. First National Bank and Trust Co. of Bismarck*, 687 F.2d 1257, 1261 (8th Cir. 1982). As a result, letters of credit are payable notwithstanding the bankruptcy, insolvency or receivership of the contracting party. *See, e.g., Lower Brule Construction Co. v. Sheesley's Plumbing & Heating Co.*, 84 B.R. 638, 644-45 (Bankr. D.S.D. 1988); *In re Leisure Dynamics. Inc.*, 33 B.R. 171, 172-73 (Bankr. D. Minn. 1983).

government for public use is contrary to Fifth Amendment "when a suit for compensation can[not] be brought"); *Preseault v. ICC*, 494 U.S. 1, 11 (1990) (unconstitutional taking exists if the government has not "provided an adequate process for obtaining . . . just compensation").

This Court should grant certiorari to review and resolve these important statutory and constitutional issues which are central to the effective and expeditious resolution of the nation's savings and loan crisis.

CONCLUSION

For all the foregoing reasons, certiorari should be granted on the questions presented.

Respectfully submitted,

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Counsel for Petitioners

June 23, 1992

APPENDIX A — ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT DATED MARCH 27, 1992

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 91-1902/1972/2287/2546MN

Resolution Trust Corporation, etc.,

Appellant,

vs.

CedarMinn Building Limited Partnership, etc., et al.,

Appellees.

Order Denying Petition for Rehearing and Suggestion for Rehearing En Banc

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The suggestion for rehearing en banc is denied. The petition for rehearing is also denied.

March 27, 1992

Order Entered at the Direction of the Court:

s/ Michael E. Gans
Clerk, U.S. Court of Appeals, Eighth Circuit

APPENDIX B — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT DATED FEBRUARY 18, 1992

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 91-1902MN

Resolution Trust Corporation, as Receiver for Midwest Savings Association, F.A.,

Appellant,

v.

CedarMinn Building Limited Partnership, a Minnesota limited partnership; Cedar Minn Realty Corp., its general partner; Minncedar Land Limited Partnership; Midunited Building Company Limited Partnership, a Minnesota limited partnership; Midrock Land Corp., its general partner; RockMinn Leasing Corp., CedarMinn Building Limited Partnership, a Minnesota limited partnership; Chemical Bank; Norstar Bank; Federal Home Loan Bank of Des Moines,

Appellees.

CedarMinn Building Limited Partnership, a Minnesota limited partnership; MinnCedar Land Limited, a Minnesota limited partnership; Midunited Building Limited Partnership, a Minnesota limited partnership; RockMinn Leasing Corp., a Minnesota corporation,

Appellees,

v.

Resolution Trust Corporation, a government corporation, and in its capacity as Receiver of Midwest Federal Savings and Loan

Appendix B

Association of Minneapolis and as Conservator and Receiver for Midwest Savings Association, F.A.,

Appellant.

Midwest Federal Savings and Loan Association of Minneapolis, in Receivership;

Midwest Savings Association, F.A., in Receivership and Conservatorship.

No. 91-1972MN

Resolution Trust Corporation, as Receiver for Midwest Savings Association F.A.,

Plaintiff-Appellee,

v.

CedarMinn Building Limited Partnership, a Minnesota limited partnership; Cedar Minn Realty Corp., its general partner; MinnCedar Land Limited; Midunited Building Company Limited Partnership, a Minnesota limited partnership; Midrock Land Corp., its general partner; RockMinn Leasing Corp.; CedarMinn Building Limited Partnership, a Minnesota limited partnership,

Defendants-Appellants.

Chemical Bank; Norstar Bank; Federal Home Loan Bank of Des Moines,

Defendants.

CedarMinn Building Limited Partnership, a Minnesota limited partnership; MinnCedar Land Limited, a Minnesota limited partnership; Midunited Building Limited Partnership, a Minnesota

limited partnership; RockMinn Leasing Corp., a Minnesota corporation,

Defendants-Appellants,

v.

Resolution Trust Corporation, a government corporation, and in its capacity as Receiver of Midwest Federal Savings and Loan Association of Minneapolis and as Conservator and Receiver for Midwest Savings Association, F.A.; Midwest Federal Savings and Loan Association of Minneapolis, in Receivership; Midwest Savings Association, F.A., in Receivership and Conservatorship,

Defendants-Appellees.

No. 91-2287MN

Resolution Trust Corporation, as Receiver for Midwest Savings Association, F.A.,

Plaintiff-Appellee,

v.

CedarMinn Building Limited Partnership, a Minnesota limited partnership; Cedar Minn Realty Corp., its general partner; MinnCedar Land Limited; Midunited Building Company Limited Partnership, a Minnesota limited partnership; Midrock Land Corp., its general partner; RockMinn Leasing Corp., CedarMinn Building Partnership, a Minnesota limited partnership,

Defendants-Appellants.

Chemical Bank; Norstar Bank; Federal Home Loan Bank of Des Moines,

Defendants.

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CedarMinn Building Limited Partnership, a Minnesota limited partnership; MinnCedar Land Limited, a Minnesota limited partnership; Midunited Building Limited Partnership, a Minnesota limited partnership; RockMinn Leasing Corp., a Minnesota corporation,

Plaintiffs-Appellants,

v.

Resolution Trust Corporation, a government corporation, and in its capacity as Receiver of Midwest Federal Savings and Loan Association of Minneapolis and as Conservator and Receiver for Midwest Savings Association, F.A.; Midwest Federal Savings and Loan Association of Minneapolis, in Receivership; Midwest Savings Association, F.A., in Receivership and Conservatorship,

Defendants-Appellees.

No. 91-2546MN

Resolution Trust Corporation, as Receiver for Midwest Savings Association, F.A.,

Plaintiff-Appellee,

v.

CedarMinn Building Partnership, a Minnesota limited partnership; Cedar Minn Realty Corp., its general partner; MinnCedar Land Limited; Midunited Building Company Limited Partnership, a Minnesota limited partnership; Midrock Land Corp., its general partner; RockMinn Leasing Corp.; CedarMinn Building Partnership, a Minnesota limited partnership,

Defendants-Appellants.

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Chemical Bank; Norstar Bank; Federal Home Loan Bank of Des Moines,

Defendants.

CedarMinn Building Limited Partnership, a Minnesota limited partnership; MinnCedar Land Limited, a Minnesota limited partnership; Midunited Building Limited Partnership, a Minnesota limited partnership; RockMinn Leasing Corp., a Minnesota corporation,

Plaintiffs-Appellants,

v.

Resolution Trust Corporation, a government corporation, and in its capacity as Receiver of Midwest Federal Savings and Loan Association of Minneapolis and as Conservator and Receiver for Midwest Savings Association, F.A.,

Defendant-Appellee.

Appeals and Cross-Appeal from the United States District Court for the District of Minnesota.

Submitted: November 13, 1991
Filed: February 18, 1992

Before FAGG, Circuit Judge, TIMBERS,* Senior Circuit Judge, and MAGILL, Circuit Judge.

MAGILL, Circuit Judge.

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* THE HONORABLE WILLIAM H. TIMBERS, Senior United States Circuit Judge for the Second Circuit, sitting by designation.

Appendix B

The Resolution Trust Corporation (RTC) appeals the district court's determination that the repudiation of certain leases by RTC as the receiver for a failed savings and loan was untimely. We find this result in error and, therefore, reverse.

I.

Midwest Federal Savings & Loan Association was mired in financial straits. Conjuring up a short-term solution to keep federal regulators at bay, Midwest Federal contracted with a group of investment partnerships to sell and lease back nineteen branch offices of the thrift. Under the two sale-leaseback agreements reached in 1985 and 1986, Midwest Federal sold nineteen branch offices to the partnerships (hereinafter collectively referred to as Cedarminn) at inflated prices. Cedarminn, in turn, agreed to lease the branches back to Midwest Federal at inflated rents. This agreement enabled Midwest Federal to show significant income during the years the sales were recognized.

Midwest Federal wholly financed the purchase by Cedarminn through a non-recourse loan to the partnerships. Midwest Federal structured its lease payments to service the debt. Midwest Federal issued two letters of credit totalling $11.8 million to ensure payment. The agreements' entire risk, therefore, devolved upon Midwest Federal.[1] The district court found that the contractual rents under the agreements were more than five times the market rate. *RTC v. Cedarminn Bldg. Ltd. Partnership*, No. 4-90-828, slip op. at 24 (D. Minn. May 22, 1991).

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1. The sale-leaseback transactions were initiated by Midwest Federal. Cedarminn and its principals had no prior connection to Midwest Federal.

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The Federal Home Loan Bank Board on February 13, 1989, declared Midwest Federal insolvent and appointed the Federal Savings and Loan Insurance Corporation (FSLIC) as conservator. On May 4, 1989, FSLIC transferred the assets and liabilities of Midwest Federal to a new entity, Midwest Savings Association. FSLIC was appointed receiver of Midwest Federal and conservator of Midwest Savings.

Congress passed the Financial Institutions Reform, Recovery and Enforcement Act (FIRREA) in August of 1989. Under FIRREA, RTC statutorily succeeded FSLIC as conservator of Midwest Savings. After negotiations aimed at selling Midwest Savings in its entirety failed, the conservator sold Midwest Savings' deposits to other institutions in October of 1990. On October 5, 1990, RTC was appointed receiver of Midwest Savings. Shortly thereafter, on October 29, 1990, RTC repudiated the Cedarminn leases.

RTC brought an action in district court seeking a declaratory judgment that its repudiation was timely. Cedarminn sued for damages and the right to draw on the letters of credit.

The district court held: (1) RTC's repudiation of the leases was invalid because it was not made within a reasonable period after RTC's appointment as conservator or receiver; and (2) Cedarminn was enjoined from drawing on the letters of credit so long as RTC continued to make timely rental payments because RTC's attempted repudiation did not constitute a default. Both sides appeal.[2]

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2. Subsequent to the filing of this appeal, Cedarminn drew on the letters of credit, claiming a separate default by RTC. Upon motion by RTC, the district (Cont'd)

Appendix B

II.

RTC repudiated the leases under 12 U.S.C.A. § 1821(e) (1) (West 1989),[3] which provides that the conservator or receiver for any insured depository institution may disaffirm or repudiate any burdensome contract or lease. In so doing, the conservator or receiver must make the repudiation determination within a reasonable period after its appointment. 12 U.S.C.A. § 1821(e)(2). The liability for a conservator or receiver which timely repudiates a lease in which it was the lessee is limited to the contractual rent accrued through the date of disaffirmance. 12 U.S.C.A. § 1821(e)(4)(B)(i).[4] The lessor loses any claim under an acceleration clause or penalty provision of the lease. 12 U.S.C.A. § 1821(e)(4)(B)(ii).

Cedarminn argues that the "reasonable period" for repudiation commences when RTC is first appointed as a conservator or receiver. Cedarminn contends the October 1990

(Cont'd)
court modified its initial order, holding: (1) Cedarminn was enjoined from dispersing the proceeds of the letters of credit, *RTC v. Cedarminn*, No. 4-90-828, slip op. at 32 (D. Minn. May 22, 1991); (2) the RTC's offsetting of its rental payments to compensate for the rental payments paid to Cedarminn from secondary leases was a "technical" default under the contract, *id.* at 19; but (3) despite the "technical" default, Cedarminn was not entitled to liquidated damages because the contract's liquidated damages clause was unenforceable as a penalty provision, *id.* at 26.

3. Unless noted otherwise, all statutory citations are to U.S.C.A. (1989).

4. The October 29, 1990, repudiation was to be effective February 28, 1991. Therefore, the contractual rent would accrue through February 28, 1991. 12 U.S.C.A. § 1821(d)(4)(B)(i)(II).

repudiation, which came fourteen months after RTC's initial appointment under FIRREA, therefore, was untimely. RTC asserts that the statute gives both the conservator and receiver an independent right to repudiation and a separate "reasonable period" in which to make the repudiation decision. The period during which it could repudiate the leases, therefore, renewed itself when RTC was appointed receiver of Midwest Savings in October 1990. The district court declared the repudiation ineffective, ruling that RTC was required to make the repudiation determination within a reasonable period of its first appointment as conservator or receiver. *RTC v. Cedarminn Bldg. Ltd. Partnership*, No. 4-90-828, slip op. at 19-20 (D. Minn. Mar. 4, 1991).

A. Independent Repudiation Rights

The plain language of FIRREA grants independent rights of repudiation to RTC in both its capacity as conservator and receiver of an institution. Therefore, even though RTC may succeed itself in the capacity of conservator or receiver of the same institution, it retains the right to repudiate leases, regardless of whether it accepted the leases in its prior capacity.

The statute at issue reads in its entirety:

> (1) Authority to repudiate contracts
>
> In addition to any other rights a conservator or receiver may have, the conservator or receiver for any insured depository institution may disaffirm or repudiate any contract or lease —
>
> (A) to which such institution is a party;

(B) the performance of which the conservator or receiver, in the conservator's or receiver's discretion, determines to be burdensome; and

(C) the disaffirmance or repudiation of which the conservator or receiver determines, in the conservator's or receiver's discretion, will promote the orderly administration of the institution's affairs.

(2) Timing of repudiation

The conservator or receiver appointed for any insured depository institution in accordance with subsection (c) of this section shall determine whether or not to exercise the rights of repudiation under this subsection within a reasonable period following such appointment.

12 U.S.C.A. § 1821(e).

In these two short subsections, Congress repeats the dual treatment of "conservator or receiver" seven times. Nowhere in the language of the statute is it stated or implied that the appointment of RTC as a conservator negates powers RTC would enjoy if it were later appointed a receiver of the same institution. Had Congress intended RTC's status as a conservator or a receiver to be mere artifice, it would have granted all duties, rights, and powers to the Corporation.[5]

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5. Throughout this opinion, the term Corporation will refer to either the (Cont'd)

Appendix B

B. Independent Repudiation Time Frame

Even though we find that the plain language of the statute confers an independent right of repudiation upon both the conservator and receiver of a failed, government-insured thrift, our inquiry is not over. We must next determine whether Congress' insistence that the decision to repudiate be made within a reasonable period constitutes an implicit restriction on the receiver's right to repudiate in situations where the receiver follows a conservator. In other words, does Congress' mandate to make the repudiation determination within a reasonable period contemplate only a single time frame? Or is the decision by RTC not to repudiate the leases in its position as conservator irrelevant to RTC's determination in its capacity as receiver?

The standard we employ to review an agency's interpretation of a statute it administers is clear.

> When a court reviews an agency's construction of the statute which it administers, it is confronted with two questions. First, always, is the question whether Congress has directly spoken to the precise question at issue. If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress. If, however, the court determines Congress has not

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RTC or the FDIC. Congress gave the RTC all of the receivership and conservatorship powers it granted the FDIC. 12 U.S.C.A. § 1441a(b) (4) (West Supp. 1991). Therefore, the use of the term Corporation will refer to either agency exercising these parallel powers.

> directly addressed the precise question at issue, the court does not simply impose its own construction on the statute, as would be necessary in the absence of an administrative interpretation. Rather, if the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute.

Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837, 842-43 (1984).

FIRREA requires the "conservator or receiver" to determine whether or not to repudiate a contract "within a reasonable period following such appointment." 12 U.S.C.A. § 1821(e)(2). We find the statute subject to conflicting readings. RTC argues that Congress intended to provide independent repudiation rights to both the conservator and receiver. Since there is no indication that Congress intended to restrict the receiver's power to repudiate in situations where it follows a conservator, RTC asserts that Congress meant to give RTC a fresh chance to repudiate contracts when it is reappointed as a receiver. Cedarminn makes a plausible argument that the "reasonable period" requirement begins to run upon the appointment of RTC as either "conservator or receiver" and, therefore, contemplates a single time frame.

Since we find the statute less clear on this point, we must accede to a permissible interpretation of the statute by RTC.[6]

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6. The RTC was established as an instrumentality of the United States to carry on a program to manage all cases of failed thrifts. H.R. Rep. No. 101-54(1), 101st Cong., 1st Sess. (1989), *reprinted in* 1989 U.S.C.C.A.N. 86, 152-53. The (Cont'd)

Chevron U.S.A., 467 U.S. at 842-43. RTC has formally interpreted § 1821(e) as granting independent rights on it as both conservator and receiver to repudiate contracts. Moreover, RTC interprets FIRREA as granting it this repudiation power as a receiver even in situations in which it had earlier failed to repudiate as conservator.[7] For the following reasons, we find reasonable RTC's interpretation that Congress intended both the conservator and the receiver to have an independent "reasonable period" in which to repudiate.

First, while the specific language of the statute is less than crystalline, the design and language of the statute as a whole, *see K Mart Corp. v. Cartier, Inc.*, 486 U.S. 281, 291 (1988), reveal the congressional intent to create independent powers of repudiation, regardless of any activity taken by RTC in a prior capacity. Throughout FIRREA, Congress specifically articulated when the Corporation was to exercise a duty, right, or power

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(Contd')
RTC is an agency of the United States when acting as a corporation and an agency of the United States to the same extent as the Federal Deposit Insurance Corporation when acting as a conservator or receiver. 12 U.S.C.A. § 1441a(b)(1)(B) (West Supp. 1991).

7. Statement of Policy Regarding Treatment of Collateralized Letters of Credit After Appointment of the Resolution Trust Corporation as Conservator or Receiver, at 3 (Sept. 25, 1990); Statement of Policy Regarding the Payment of Interest on Direct Collateralized Obligations after Appointment of the Resolution Trust Corporation as Conservator or Receiver, at 3 (April 1990). The latter policy statement specifically provides that a receiver retains all powers of repudiation regardless of whether a prior conservator or receiver of the same institution honored those contracts.

in its capacity as a "conservator or receiver."[8] In each instance,

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8. 12 U.S.C.A. § 1821(c) (1) authorizes the Corporation to accept appointment as "conservator or receiver" for any insured depository institution; §§ 1821(c) (2) (C) and (3) (C) stipulate that the Corporation shall not be subject to any other agency of the United States when it is acting as a "conservator or receiver;" § 1821(c) (3) (A) provides that the Corporation may accept appointment as a "conservator or receiver" of a state insured depository institution; § 1821(c) (3) (B) grants the Corporation the same powers as "conservator or receiver" when appointed by a state authority as when appointed by a federal authority; §§ 1821(c) (4) and (5) articulate the grounds under which the Corporation may appoint itself as sole "conservator or receiver" of an institution; § 1821(c) (7) establishes the judicial review available to an institution challenging the Corporation's appointment of itself as "conservator or receiver;" § 1821(d) (2) (A) stipulates that the Corporation in its capacity as "conservator or receiver" shall accede to the rights of the institution's prior management; §§ 1821(d) (2) (B) and (C) authorize the Corporation as "conservator or receiver" to operate the institution; § 1821(d) (2) (G) authorizes the Corporation as "conservator or receiver" to merge the institution with another insured institution or transfer assets of the institution; § 1821(d) (2) (H) authorizes the Corporation as "conservator or receiver" to pay valid obligations of the institution; § 1821(d) (2) (I) (West Supp. 1991) grants subpoena powers to the Corporation as "conservator or receiver" of an institution; § 1821(d) (2) (J) (West Supp. 1991) grants incidental powers to the Corporation as "conservator or receiver;" §§ 1821(d) (13) (A) and (B) delineate the Corporation's duties and rights as "conservator or receiver" pertaining to final unappealable judgments; § 1821(d) (14) establishes the statute of limitations for claims brought by the Corporation as "conservator or receiver;" §§ 1821(d) (15) (A)-(C) delineate the accounting and record keeping requirements of the Corporation as "conservator or receiver;" § 1821(d) (17) (West Supp. 1991) authorizes the Corporation as "conservator or receiver" to avoid fraudulent transfers; § 1821(d) (18) enables the Corporation as "conservator or receiver" to request a court to attach assets; § 1821(e) (1) authorizes the Corporation as "conservator or receiver" to repudiate contracts; § 1821(e) (2) restricts the time under which the Corporation as "conservator or receiver" may elect to repudiate contracts; §§ 1821(e) (3)-(7) set out the rights of the parties after the Corporation as "conservator or receiver" has repudiated a contract or lease; §§ 1821(e) (9)-(10) delineate procedures for the Corporation

(Cont'd)

it is clear that Congress intended the duty, right, or power to be enjoyed or exercised by both the conservator and the receiver. It stretches credibility to assume Congress intended any of these rights to be forfeited in instances when the Corporation preceded itself as conservator or receiver of an institution. More instructive, however, is the care Congress took to delineate those duties, rights, and powers the Corporation could pursue only in its capacity as receiver, or only in its capacity as conservator, but not both.[9]

(Cont'd)
as "conservator or receiver" to transfer certain financial contracts; § 1821(e)(12) authorizes the Corporation as "conservator or receiver" to enforce contracts entered into by the institution; and § 1821(k) authorizes the Corporation as "conservator or receiver" to bring suit against former officials of the institution.

9. Sections 1821(c)(2)(A) and 1821(c)(6) articulate the different criteria under which the Corporation "may" be appointed conservator and "shall" be appointed receiver; §§ 1821(c)(2)(D) and 1821(c)(3)(D) mandate that any institution to which the Corporation is appointed conservator shall remain under the supervision of the federal banking agency or the state banking supervisory authority; § 1821(c)(8) enables the Corporation, when it has appointed itself conservator of a state institution, to appoint itself receiver of that institution; § 1821(c)(9)(B) grants the Corporation as receiver of a state institution the additional power to liquidate the institution; §§ 1821(d)(2)(D) and (E) articulate the separate powers of the Corporation in its capacity as conservator and in its capacity as receiver; § 1821(d)(2)(F) grants the Corporation in its capacity as receiver the power to create a new institution to take over the assets and liabilities of the former institution, or to create a new national bank or bridge bank; §§ 1821(d)(3)-(11) establish the procedures to be used by the Corporation as receiver to handle claims against the institution; § 1821(d)(12) articulates different powers to stay legal proceedings enjoyed by the Corporation as receiver and as conservator; § 1821(d)(13)(D) limits the judicial review of actions taken by the Corporation in its capacity as receiver; § 1821(d)(15)(D) enables the Corporation in its capacity as receiver to destroy records of an institution under certain conditions; and § 1821(e)(8) (West Supp. 1991) establishes rights of parties upon the termination of certain qualified financial products by the Corporation in its capacity as receiver.

Second, the traditional tools of statutory construction likewise elicit a clear congressional directive to grant RTC an independent right of repudiation in both its capacity as conservator and receiver. The accepted canon of statutory construction is to treat the disjunctive "or" as giving independent meaning to the words it separates, unless the context of the statute requires otherwise. *Reiter v. Sonotone Corp.*, 442 U.S. 330, 339 (1979); *United States v. Smeathers*, 884 F.2d 363, 364 (8th Cir. 1989) (per curiam); *United States v. Lane*, 464 F.2d 593, 595 (8th Cir.), *cert. denied*, 409 U.S. 876 (1972).

> 'The word "or" in the statute is not a fertile word which is subject to varied constructions.' *United States v. Newman*, 405 F.2d 189, 197 (5th Cir. 1968). When 'or' is inserted between two clauses, the clauses are treated disjunctively rather than conjunctively.

U.S. Customs Serv. v. Federal Labor Relations Auth., 739 F.2d 829, 832 (2d Cir. 1984). In *Ballentine v. De Sylva*, 226 F.2d 623, 625 (9th Cir. 1955), *aff'd*, 351 U.S. 570 (1956), a statute provided that the "widow . . . or children" of a deceased author of a copyrighted work may apply for an extension of the copyright. The court held that the disjunctive application of the word "or" granted both the widow and the children the right to apply for the extension. *Id.* at 627. Moreover, the action by one of the enumerated persons did not cut off the rights of the other merely because one person acted first. *Id.*

Third, the statutory history of FIRREA reveals nothing that indicates Congress intended something other than giving the right of repudiation to both the conservator and the receiver. The House Report tracks the language of the statute, giving the repudiation

power to the conservator or receiver. H.R. Rep. No. 101-54(1), 101st Cong., 1st Sess. (1989), *reprinted in* 1989 U.S.C.C.A.N. 86, 127. Moreover, the statute and its legislative history emphasize that the powers granted RTC under FIRREA parallel the powers granted conservators or receivers under the former law. *Id.* at 126; 12 U.S.C.A. § 1441a(b) (4) (West Supp. 1991); S. Rep. No. 101-19, 101st Cong., 1st Sess. 31 (1989).

It has been recognized for at least a century that receivers may repudiate contracts and leases. *Sunflower Oil Co. v. Wilson*, 142 U.S. 313, 322 (1892); *First Nat'l Bank of Chicago v. First Nat'l Bank of Wheaton*, 78 F.2d 502, 502-03 (7th Cir.), *cert. denied*, 296 U.S. 651 (1935); *Kennedy v. Boston-Continental Nat'l Bank*, 84 F.2d 592, 597 (1st Cir. 1936), *cert. dismissed*, 300 U.S. 684 (1937); *see* R. Clark, 2 *A Treatise on The Law and Practice of Receivers*, § 442 at 733-34 (3d ed. 1959). This power continued to be exercised by the FDIC and FSLIC in the years preceding FIRREA. 12 C.F.R. § 549.3(a) (1988); *Argonaut Sav. & Loan Ass'n v. FDIC*, 392 F.2d 195, 197 (9th Cir.), *cert. denied*, 393 U.S. 839 (1968); *FDIC v. Grella*, 553 F.2d 258, 262 (2d Cir. 1977). Conservators of government-insured savings institutions and banks also held this power of repudiation. 12 C.F.R. § 548.2(k) (1988) ("The conservator . . . may . . . (k) . . . repudiate any lease or contract he considers burdensome"); *Dinan v. First Nat'l Bank of Detroit*, 117 F.2d 459, 460 (6th Cir. 1941), *cert. dismissed*, 315 U.S. 824 (1942); *Buhl Land Co. v. Kavanagh*, 131 F. Supp. 136, 138 (E.D. Mich. 1954). Since Congress intended RTC to exercise rights formerly held by the FDIC and FSLIC, there can be no doubt that Congress intended RTC to retain the independent rights granted to conservators and receivers to repudiate leases.

Fourth, the importance of retaining an independent right to repudiate contracts is exemplified by the distinct missions of the

conservator and receiver. That Congress intended conservators and receivers to have different missions is clear. RTC as conservator of a failed institution was empowered to take action necessary to restore the failed thrift to a solvent position and "to carry on the business of the institution and preserve and conserve the assets and property of the institution." 12 U.S.C.A. § 1821(d)(2)(D). As receiver, on the other hand, RTC was empowered to liquidate the institution. 12 U.S.C.A. § 1821(d)(2)(E).

Cedarminn, relying on *RTC v. United Trust Fund*, 775 F. Supp. 1465, 1468 (S.D. Fla. 1991), argues that the distinction in duties between conservators and receivers is more theoretical than real. "[T]he RTC frequently appoints conservators, receivers, new conservators, and new receivers in case of thrift difficulties," and the changing back and forth from one legal entity to another frequently amounts to no more than blanket signing of papers and mere legal formalities. *Id.*

It is difficult to argue that the concern that RTC could prolong indefinitely the repudiation decision is misplaced. Nevertheless, we refuse to adopt such a cavalier attitude about the distinction in roles between the conservator and receiver.

At least as early as the 1930s, it was recognized that the purpose of a conservator was to maintain the institution as an ongoing concern. *Bryce v. National City Bank of New Rochelle*, 17 F. Supp. 792, 799 (S.D.N.Y.), *aff'd*, 93 F.2d 300 (2d Cir. 1937). The Home Owners' Loan Act of 1933, 12 U.S.C. § 1464(d)(6)(D) (1988) (amended 1989), specifically provided that a conservator of a federal savings and loan was to "operate the association in its own name or to conserve its assets." Receivers, on the other hand, have been empowered to liquidate the institution. *FDIC v. Grella*, 553 F.2d 258, 261 (2d Cir. 1977).

Appendix B

This distinction was not only specifically recognized in FIRREA, it was emphasized in the Conference Report.

> The title . . . distinguishes between the powers of a conservator and receiver, making clear that a conservator operates or disposes of an institution as a going concern while a receiver has the power to liquidate and wind up the affairs of an institution.

H.R. Conf. Rep. No. 101-209, 101st Cong., 1st Sess. 398 (1989).

This distinction in the roles between conservator and receiver is not only recognized historically, but is practical as well, particularly as it pertains to the repudiation strategy of a conservator and receiver. The conservator's mission is to conduct an institution as an ongoing business. In that light, the strategic decision whether or not to repudiate a lease — particularly when the institution is operating a consumer enterprise from the leased premises — stands apart from the strategy of a receiver, whose interest, by definition, is shutting the business down. A conservator needs an open door; a receiver does not. Therefore, the value of a specific lease could vary significantly depending on the mission of the occupying party at the particular time. The requirement that RTC make the repudiation decision once and for all shortly after its first appointment as conservator would put RTC in the untenable position of trying to operate the business as an ongoing concern with one hand, while at the same time calculating the lease repudiation issue as if it were shutting the business down.

This distinction is illustrated by *Monument Square Assocs., Inc. v. RTC*, No. 90-12060-T (D. Mass. Dec. 13, 1991). In *Monument Square*, RTC was appointed conservator of Home

Owners Savings Bank. RTC was burdened with two leases, only one of which covered property actually being used by the Corporation. Therefore, RTC repudiated the lease on the non-occupied property within a month of its appointment as conservator. *Id.* at 2. The lease on the property being used by the institution, however, was not repudiated until nearly six months later, after the institution was placed in receivership. *Id.* This case articulates the need for RTC to retain independent rights of repudiation in its two capacities. Obviously, RTC as conservator would choose to repudiate a lease on property it is not using, but might hesitate to repudiate the lease on property from which it is conducting a business. On the other hand, once the institution is placed into receivership, RTC might elect to repudiate the lease on the property it formerly used to conduct its business. Relying on this dichotomy of purpose and the plain language of the statute, the *Monument Square* court determined that RTC retained a separate right to repudiate even though it followed itself as conservator and even though it elected as conservator not to repudiate the contract.[10] *Id.* at 7.

Fifth, Congress' grant of the repudiation right to the conservator or receiver must also be viewed in light of the fact that it has long been recognized that conservators of failed institutions are often replaced by receivers. *Dinan v. First Nat'l Bank of Detroit*, 117 F.2d 459, 460 (6th Cir. 1941), *cert. dismissed*,

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10. We need not decide whether the Corporation retains the repudiation right as a receiver when it immediately preceded itself as receiver of the same institution. *See 701 NPB Assocs. v. FDIC*, No. 91-8181-civ-nesbitt, mem. at 6 (S.D. Fla. Dec. 2, 1991) (holding that the "reasonable period" for the Corporation to make a repudiation decision dated from its initial appointment as receiver of a failed thrift, even though the agency appointed itself receiver six months later).

315 U.S. 824 (1942); *Buhl Land Co. v. Kavanagh*, 131 F. Supp. 136, 138 (E.D. Mich. 1954). Prior to the passage of FIRREA, Congress recognized that conservators appointed for failed institutions may be succeeded by receivers. 12 U.S.C. § 1464(d) (6) (D) (1988) (amended 1989); *Lincoln Sav. & Loan Ass'n v. Wall*, 743 F. Supp. 901, 902-03 (D.D.C. 1990). FIRREA specifically retained this power. 12 U.S.C.A. § 1464(d) (2) (F) (West Supp. 1991).

Finally, it must be recognized that Congress granted broad power to the Corporation[11] and directed that conservators and receivers should not shy away from wielding this power. Congress specifically directed RTC to look closely at sale-leaseback transactions such as those at issue here.

> In detailing the repudiation power Title II provides for repudiation of real property leases. The disaffirmance of burdensome leases should take into account the total circumstances of the lease, including whether, in the case of a sale and lease back, the lease was executed as part of an arm's length transaction.

H.R. Conf. Rep. No. 101-209, 101st Cong., 1st Sess. 399 (1989). Cedarminn stresses that the leases were negotiated at arm's length. What Cedarminn fails to recognize is that Midwest's arms were tied behind its back by its financial crisis. The luxuriant terms of these contracts should have made this evident to Cedarminn.

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11. The grant of this extraordinary power to repudiate contracts is given "[i]n addition to any other rights a conservator or receiver may have." 12 U.S.C.A. § 1821(e) (1).

In fact, counsel for Cedarminn admitted to the court that no sophisticated business person would accept these leases.[12]

For all of these reasons, we find RTC's interpretation of the statute permissible. Moreover, our analysis shows that the congressional intent is so apparent that RTC's interpretation is the most reasonable interpretation.

C. "Reasonable Period"

Since we find that RTC retained a new power to repudiate leases when it was appointed receiver in October 1990, we need only briefly address the reasonable period limitation of 12 U.S.C.A. § 1821(e)(2). FIRREA does not define reasonableness. Congress specifically intended to give RTC flexibility in determining what constitutes a reasonable period for repudiation.[13]

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12. Reminding the court that RTC had been unable to sell Midwest Federal as a whole, partially because no one wanted to assume the leases, Cedarminn's counsel said, "Are we to believe today . . . that these people represented by the likes of Briggs & Morgan, and Best & Flanagan, the Carl Pohlads of this community, essentially have agreed to honor a $4.2 million obligation per year of rentals? . . . Of course they didn't." *RTC v. Cedarminn*, No. 4-90-828, slip op. at 25 (D. Minn. May 22, 1991).

13. Both the President's bill and the House bill initially set the repudiation period at 90 days. H.R. Rep. No. 101-54(1), 101st Cong., 1st Sess. (1989), *reprinted in* 1989 U.S.C.C.A.N. 86, 331; 1 G. Pulles, R. Whitlock and J. Hogg, *FIRREA, A Legislative History and Section-By-Section Analysis*, at 189-90 (1990). In conformity with the Senate bill, the final statute eliminated the express 90-day restriction, apparently concluding that RTC ought to be given some flexibility.

FIRREA's grant of a "reasonable period" within which to repudiate

(Cont'd)

Appendix B

The amount of time that is reasonable must be determined according to the circumstances of each case. *Union Bank v. Federal Sav. & Loan Ins. Corp.*, 724 F. Supp. 468, 471 (E.D. Ky. 1989). No one could quarrel seriously with the fact that RTC's repudiation within twenty-four days of its appointment as receiver was reasonable. We need not decide whether the fourteen-month delay between RTC's appointment as conservator and its subsequent repudiation as receiver was unreasonable. We need only point out that since Cedarminn could show no prejudice by RTC's continued attempts to renegotiate the leases prior to the placement of Midwest Savings in receivership,[14] RTC's repudiation could have been reasonable regardless of whether it had been appointed receiver of the institution and given an independent opportunity to repudiate the leases.

III.

Congress passed FIRREA as emergency legislation to resolve

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contracts follows the common law approach. *Sunflower Oil Co. v. Wilson*, 142 U.S. 313, 322 (1892); *FDIC v. Grella*, 553 F.2d 258, 262 (2d Cir. 1977); *Buhl Land Co. v. Kavanagh*, 131 F. Supp. 136, 143 (E.D. Mich. 1954).

14. Upon appointment as conservator, individuals responsible for the management of Midwest Savings determined at least as early as May 22, 1989, that the leases produced "significant detrimental effects" to the association's finances. *RTC v. Cedarminn*, No. 4-90-828, slip op. at 4-5 (D. Minn. Mar. 4, 1991). The RTC dutifully informed Cedarminn in December 1989 that it was considering repudiation of the leases. *Id.* at 5-6. Evidence also showed that RTC pursued negotiations with Cedarminn to renegotiate the leases to enable Midwest Savings to continue to operate from the offices. *Id.* at 7. Cedarminn clearly was not prejudiced by the ongoing negotiations. There were no businesses eager to take on these leases. Cedarminn itself admitted the leases were utteriy unassumable by anyone. Yet, despite the outrageous terms of these leases, Cedarminn continued to receive full rent.

expeditiously the "monumental problems involved with the unprecedented costs" of the savings and loan crisis.[15] H.R. Rep. No. 101-54(1), 101st Cong., 1st Sess. (1989), *reprinted in* 1989 U.S.C.C.A.N. 86, 104. Among the powers granted by Congress to RTC is the extraordinary right to repudiate contracts and leases RTC deems burdensome. That Congress intended this powerful tool to be exercised independently by conservators and receivers is clearly a permissible construction of the statute. We therefore find that RTC retained an independent right to repudiate the leases with Cedarminn within a reasonable period of its appointment as receiver. Since the repudiation occurred within twenty-four days of its appointment, FIRREA has been fully complied with. Cedarminn's damages are limited to those prescribed under 12 U.S.C.A. § 1821(e) (4). The judgment below is reversed.

A true copy.

Attest:

CLERK, U.S. COURT OF APPEALS, EIGHTH CIRCUIT.

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15. The Senate Report noted that 500 thrifts failed between 1980 and 1988 — three and one-half times the number of thrift failures in the prior 45 years combined. At the time of the report, the FSLIC had spent an estimated $78 billion in the 1980s alone, making the federal deposit insurer insolvent and illiquid. The General Accounting Office estimated that at least 338 thrifts, or more than 10% of all thrifts, were insolvent as of December 31, 1988, even though the FSLIC had liquidated or merged more than 200 insolvent thrifts during 1988. S. Rep. No. 101-19, 101st Cong., 1st Sess. 2 (1989).

APPENDIX C — MEMORANDUM AND ORDER OF UNITED STATES DISTRICT COURT, DISTRICT OF MINNESOTA, FOURTH DIVISION DATED MARCH 4, 1991

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA
FOURTH DIVISION

CIVIL 4-90-828

Resolution Trust Corporation, as Receiver for Midwest Savings Association, F.A.,

Plaintiff,

v.

Cedarminn Building Limited Partnership, a Minnesota limited partnership; Cedar Minn Realty Corp., its general partner; Minncedar Land Limited Partnership; MidUnited Building Company Limited Partnership, a Minnesota limited partnership; Midrock Land Corp., its general partner; Rockminn Leasing Corp.; Cedarminn Building Partnership, a Minnesota limited partnership, Chemical Bank; Norstar Bank and Federal Home Loan Bank of Des Moines,

Defendants.

CIVIL 4-90-829

Cedarminn Building Limited Partnership, a Minnesota limited partnership; Minncedar Land Limited Partnership, a Minnesota limited partnership; Midunited Building Limited Partnership, a Minnesota limited partnership; and Rockminn Leasing Corp., a Minnesota corporation,

Plaintiffs,

Appendix C

v.

Resolution Trust Corporation, a government corporation, and in its capacity as Receiver of Midwest Federal Savings and Loan Association of Minneapolis and as Conservator and Receiver for Midwest Savings Association, F.A.; Midwest Federal Savings and Loan Association of Minneapolis, in Receivership; and Midwest Savings Association, F.A., in Receivership and Conservatorship,

Defendants.

John R. Yanish, Bradley J. Martinson, Petersen, Tews & Squires, 4800 IDS Center, 80 South Eighth Street, Minneapolis, MN 55402-2208, for Resolution Trust Corporation, for receiver of Midwest Federal Savings and Loan Association of Minneapolis, and for Receiver and Conservator of Midwest Savings Association, F.A.

Robert R. Weinstine, Steven C. Tourek, Gina M. Grothe, Winthrop & Weinstine, 3200 Minnesota World Trade Center, 30 East Seventh Street, St. Paul, MN 55101; Roger B. Kaplan, Wilentz, Goldman & Spitzer, P.A., 90 Woodbridge Center Drive, P.O. Box 10, Woodbridge, NJ 07095, for Cedarminn Building Limited Partnership, Minncedar Land Limited Partnership, and Midunited Building Limited Partnership, Rockminn Leasing Corp.

Donald C. Macdonald, Robert L. Schnell, Jr., Faegre & Benson, 2200 Norwest Center, 90 South Seventh Street, Minneapolis, MN 55402-3901, for Chemical Bank.

This matter is before the Court on cross motions of Resolution Trust Corporation, Cedarminn Building Limited Partnership, Minncedar Land Limited Partnership, Midunited Building Limited

Partnership, Rockminn Leasing Corp. and Chemical Bank for summary judgment.

FACTS

This matter is before the Court on cross motions for summary judgment in two parallel actions involving "sale-leaseback" transactions in 1985 and 1986 by which a group of investment companies (hereinafter collectively referred to as Cedarminn) purchased nineteen branch offices of Midwest Federal Savings & Loan Association (hereinafter Midwest Federal) at what were apparently above market prices with an agreement to lease these branch offices back to Midwest Federal at what were apparently above market rates. The transactions were financed with funds provided by Midwest Federal.

Pursuant to the leases, Midwest Federal agreed to deliver to Cedarminn two standby letters of credit as security for its performance under the leases, one dated October 8, 1985 in the amount of $5 million and a second dated August 28, 1986 in the amount of $5,333,000.

The letters of credit were issued by the Federal Home Loan Bank of Des Moines, one of the defendants herein. The 1986 letter of credit was subsequently increased to $6.8 million when the lease agreement was renewed in 1990. The $6.8 million letter of credit was issued to Chemical Bank as named beneficiary and is claimed by Chemical Bank as collateral security for loans by Chemical Bank to Cedarminn.[1]

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1. Cedarminn incorrectly states that the 1986 letter of credit was issued to Cedarminn and later assigned to Chemical Bank. Chemical Bank is named as beneficiary of both the 1986 letter of credit in the amount of $5,333,000, as well as the letter of credit in the amount of $6.8 million.

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To secure the letters of credit discussed above, Midwest Federal pledged certain assets to the Federal Home Loan Bank but subsequently substituted $11.8 million in cash as collateral. According to RTC, the result of the sale-leaseback transactions at issue in the present lawsuits was to inflate Midwest Federal's earnings and regulatory capital.

On February 13, 1989, the Federal Home Loan Bank Board determined that Midwest Federal was insolvent, whereupon the Federal Savings & Loan Insurance Corporation (FSLIC) was appointed conservator of Midwest Federal. On May 4, 1989, FSLIC was appointed receiver to oversee the liquidation of Midwest and on the same date FSLIC entered into a purchase and assumption transaction with a new entity, Midwest Savings Association, F.A., (MSA), by which MSA assumed substantially all of the assets and liabilities of Midwest Federal. Pursuant to this transaction, MSA assumed both the leases described herein and the assets securing the letters of credit. Upon creation of MSA, FSLIC was appointed conservator of MSA, and following passage of the Financial Institutions Reform, Recovery and Enforcement Act (FIRREA) in August of 1989, the RTC succeeded FSLIC as conservator of MSA.

Cedarminn has obtained through discovery in this action extensive documentation from the files of Midwest Federal, FSLIC and RTC. These documents indicate that the individuals responsible for the management of MSA determined at least as early as May 22, 1989 that the leases produced "significant detrimental effects to the Association's financial expenses for the years 1989 through the years 2003 . . . ." Affidavit of David A. Kristal, Exh. 20. Sometime in early to mid-1989, representatives of Midwest Federal and Cedarminn began negotiations concerning

the leases.[2] Negotiations produced various nonbinding memoranda of understanding and letters of intent until September of 1989. On September 5, 1989 Cedarminn executed a discussion draft of an agreement to modify the lease arrangement which had been forwarded to it by MSA. The draft explicitly stated that "finalization of any proposal will be subject to obtaining approval from the various committees, boards, and agencies now responsible for the operation of Midwest Savings Association, F.A.; it being understood, however, that this discussion draft will be immediatly forwarded for consideration to the appropriate committees in Chicago and Washington, D.C." Kristal Aff. Exh. 33.

The September agreement never received final approval. Rather, in December of 1989, MSA informed Cedarminn that in its view the only viable alternative relating to the leases was for MSA to pay Cedarminn a lump sum cash payment in exchange for termination of the leases, for the mortgages on the buildings to be satisfied and the buildings and land conveyed back to MSA. During a telephone conversation between Cedarminn principal Barry Lang and Midwest Federal official David Kuebelbeck, Kuebelbeck informed Lang of RTC's right under the recently enacted FIRREA to repudiate the leases. Kuebelbeck's notes of this telephone conversation state:

> I . . . advised him that when reviewing the matter it will be beneficial for him and his attorney to review the rights of the conservator under the recently enacted FIRREA. He asked me to explain briefly what those rights were and I told him that

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2. A June 5, 1989 letter to Cedarminn from MSA acknowledged that the leases had been a subject for discussion "for several months." Kristal Aff. Exh. 24.

> the conservator had extensive powers and that one of those powers is the right of repudiation. He then asked whether or not the Association was repudiating its leases, and I said that no decision had been made on that matter at this time, however, he should be aware that the right did, in fact, exist.

Kristal Aff. Exh. 40.

In the course of discovery in this action, Cedarminn has obtained a memorandum dated January 4, 1990 addressed to the regional director of RTC regarding the sale-leaseback situation apparently prepared by RTC officials and reviewed by RTC legal counsel. The memo notes that one of the pitfalls of repudiation could be loss of $11.8 million from a draw under the letters of credit. The memorandum notes that "with the passage of FIRREA the repudiation option gives the Association much more bargaining leverage which we plan to take advantage of. We have notified the partnerships that all previous discussions have been withdrawn and they should review the new law with their attorneys." Kristal Aff. Exh. 34. Another memorandum dated January 4, 1990 addressed to RTC's regional director from RTC's managing attorney expresses doubt that a decision to repudiate would be deemed to have been made within a "reasonable period" as required by FIRREA. The memorandum opined that if MSA were to repudiate the leases in January 1990, MSA would have "a 50% to 60% chance of successfully arguing that such repudiation was timely." Kristal Aff. Exh. 44.

Cedarminn claims that RTC refused to negotiate with it from January through June of 1990 unless Cedarminn submitted a cash proposal. A May 17, 1990 RTC memorandum indicates that settlement with the partnership was the desired approach based,

in part, on "the uncertainty of successfully repudiating the lease without having the letter of credit drawn against." Kristal Aff. Exh. 50. This memorandum, however, noted that the "threat of repudiation" would "prove beneficial" "as a leverage in our discussions." *Id.*

Various proposals traded hands between June and August of 1990 but yielded no agreement. At the same time, RTC as conservator of MSA attempted to sell MSA, together with MSA's interest in the branch leases, but found no acceptable bidders. Affidavit of Craig Nulliner ¶ 7.

In October of 1990 MSA sold its deposits to various other institutions, and on October 5, 1990, RTC was appointed receiver of MSA in order to conduct its liquidation.

On October 29, 1990, RTC notified Cedarminn of its intention to repudiate the leases effective February 28, 1991, pursuant to FIRREA, 12 U.S.C. § 1821(e). At this time, RTC tendered to Cedarminn all rentals owing through the effective date of the repudiation, in accordance with section 1821(e).

On October 30, 1990, plaintiff RTC, as receiver for MSA, filed its complaint in this action seeking declaratory judgment that Cedarminn is entitled to no damages as a result of RTC's actions and that the letters of credit are therefore unenforceable. RTC also seeks an order compelling the Federal Home Loan Bank to return the letters of credit and the collateral securing them to RTC.

On the same date, the entities comprising Cedarminn filed their complaint in this action seeking a declaratory judgment that RTC's repudiation of the leases was contrary to FIRREA and that Cedarminn may exercise its rights under the letters of credit

in the event RTC continues to default under the leases. In the alternative, Cedarminn seeks a declaration that to the extent RTC's repudiation was valid under FIRREA, the repudiation constitutes an unlawful taking of property without just compensation in violation of the fifth amendment to the United States Constitution, as well as the Constitution of the State of Minnesota.

RTC now moves for summary judgment in its favor in both cases. Cedarminn moves for summary judgment in both cases on the issue of its rights under the letters of credit. Chemical Bank, defendant in the action filed by RTC, seeks summary judgment on the issue of its rights under one of the letters of credit.

DISCUSSION

A movant is not entitled to summary judgment unless the movant can show that no genuine issue exists as to any material fact. Fed.R. Civ. P. 56(c). In considering a summary judgment motion, a court must determine whether "there are any genuine factual issues that properly can be resolved only by a finder of fact because they may reasonably be resolved in favor of either party." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 250 (1986). The role of a court is not to weigh the evidence but instead to determine whether, as a matter of law, a genuine factual conflict exists. *AgriStor Leasing v. Farrow*, 826 F.2d 732, 734 (8th Cir. 1987). "In making this determination, the court is required to view the evidence in the light most favorable to the nonmoving party and to give that party the benefit of all reasonable inferences to be drawn from the facts." *AgriStor Leasing*, 826 F.2d at 734. When a motion for summary judgment is properly made and supported with affidavits or other evidence as provided in Fed.R.Civ.P. 56(c), then the nonmoving party may not merely rest upon the allegations or denials of the party's pleading, but

must set forth specific facts, by affidavits or otherwise, showing that there is a genuine issue for trial. *Lomar Wholesale Grocery, Inc. v. Dieter's Gourmet Foods, Inc.*, 824 F.2d 582, 585 (8th Cir. 1987), *cert. denied,* 108 S.Ct. 707 (1988). Moreover, summary judgment must be entered against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial. *Celotex Corp. v. Catrett,* 477 U.S. 317, 324 (1986).

I. *Whether RTC's Repudiation of the Leases was Legal*

As noted above, FIRREA authorizes conservators or receivers appointed under the Act to repudiate contracts or leases. FIRREA, 12 U.S.C. § 1821(e). The provision provides that a conservator or receiver may disaffirm or repudiate any contract or lease:

> (A) to which such institution is a party;
>
> (B) the performance of which the conservator or receiver, in the conservator's or receiver's discretion, determines to be burdensome; and
>
> (C) the disaffirmance or repudiation of which the conservator or receiver determines, in the conservator's or receiver's discretion, will promote the orderly administration of the institution's affairs.

Id. If a lease is repudiated the conservator or receiver is liable for contractual rents accruing before the later of the date the notice of repudiation was mailed or became effective. 12 U.S.C. § 1821(e)(4). The lessor "shall . . . have no claim for damages

under any acceleration clause or other penalty provision in the lease . . . ." *Id.* The Act requires that the conservator or receiver "determine whether or not to exercise the rights of repudiation under this subsection *within a reasonable period following such appointment.*" 12 U.S.C. § 1821(e)(2) (emphasis added).

In opposition to RTC's motion for summary judgment, Cedarminn argues that RTC's October 29, 1990 repudiation of the lease agreements was unlawful under FIRREA, 12 U.S.C. § 1821(e). For purposes of the present motions, Cedarminn does not seriously question whether any of the factors set forth in subdivision of 12 U.S.C. § 1821(e) were met, *i.e.*, that (1) Midwest Federal was a party to the lease agreements; (2) the lease agreements were burdensome; and (3) repudiation would promote the orderly administration of the institution's affairs.[3] Rather, Cedarminn argues that summary judgment is inappropriate because there is a genuine issue of material fact concerning whether RTC exercised its right of repudiation under FIRREA "within a reasonable period" following its appointment, as required by subdivision 2 of 18 U.S.C. § 1821(e).

It has long been established that the receiver of an insolvent national bank has the power to repudiate the unexpired term of

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3. While Cedarminn argues almost exclusively that the repudiation was invalid as untimely, Cedarminn does state for the first time in its memorandum in opposition to RTC's motion for summary judgment that there exist genuine issues of material fact concerning whether the lease repudiation complied with FIRREA's requirement that repudiation promote the "orderly administration of the institution's affairs." However, in view of the Court's disposition of this matter below, it is unnecessary to reach this issue. Cedarminn does, however, expressly concede the "burdensomeness" issue. Cedarminn's Memorandum in Opposition to Resolution Trust Corporation's Motion for Summary Judgment at 18 n.10.

a lease of the bank premises. *See Federal Deposit Insurance Corp. v. Grella,* 553 F.2d 258, 262-63 (2d Cir. 1977); *First National Bank of Chicago v. First National Bank of Wheaton,* 78 F.2d 502 (7th Cir.), *cert. denied,* 296 U.S. 651 (1935); *Buhl Land Co. v. Kavanagh,* 131 F.Supp. 136, 143 (E.D.Mich. 1954), *aff'd,* 223 F.2d 265 (5th Cir. 1955); *Argonaut Savings & Loan Association v. Federal Deposit Insurance Corp.,* 392 F.2d 195 (9th Cir.), *cert. denied,* 393 U.S. 839 (1968). Indeed, in enacting section 1821(e), Congress recognized that it was confirming "the historic right of a conservator or receiver to disaffirm or repudiate contracts." House Rep. No. 101-54(I), *reprinted in* 1989 U.S. Code & Cong. Admin. News (Sept. 1989) at 127. Not only has it long been the law that the receiver of a national bank could repudiate the unexpired term of a bank's lease, it has also been required that such power be exercised within a "reasonable time." *See also Kennedy v. Boston-Continental National Bank,* 84 F.2d 592, 597 (1st Cir. 1936), *cert. dismissed,* 300 U.S. 684 (1937); *Boston-Continental National Bank v. Wendell Phillips Co.,* 84 F.2d 599 (1st Cir. 1936), *cert. dismissed,* 300 U.S. 684 (1937); *Dinan v. First National Bank of Detroit,* 117 F.2d 459, 461-62 (6th Cir. 1941), *cert. denied,* 315 U.S. 824 (1942) (confirming bank receiver's power to repudiate lease). *See also Fidelity Safe Deposit & Trust Co. v. Armstrong,* 35 F. 567 (C.C.Ohio 1888).[4]

Only two courts to date have construed the "reasonable time" language of FIRREA, one finding that three weeks between appointment and repudiation was not unreasonable, *see Union Bank v. FSLIC,* 724 F.Supp. 468, 471 (E.D.Ky. 1989), and the other finding eight months excessive, *see Rechler Partnership v.*

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4. Under the Bankruptcy Code, if a trustee does not assume or reject an unexpired lease under which the debtor is a lessee within sixty days after the order for relief, such lease is deemed rejected. 11 U.S.C. § 1365(d)(4).

Resolution Trust Corp., CIVIL 90-3091 (D.N.J. 1990); Affidavit of William H. Mohrman, Exh. A, Transcript of Bench Opinion. None of the decisions predating FIRREA focused directly on the "reasonable time" issue.

In *Union Bank,* RTC in its capacity as conservator of a failed savings and loan sought to repudiate a foreclosure sale bid agreement under FIRREA, 12 U.S.C. § 1821(e)(2). The FSLIC had been appointed conservator on April 6, 1989 and subsequently replaced as conservator by RTC. RTC did not repudiate the agreement, however, until August 24, 1989. The party seeking to enforce the agreement argued that the repudiation was not made within a "reasonable period." The court rejected this argument noting that FIRREA only empowered the conservator to repudiate effective August 9, 1989, and that the repudiation was communicated within three weeks of this date. The court held that whether a repudiation has occurred within a reasonable time "depends upon the circumstances of the case." *Union Bank,* 724 F.Supp. at 471. In concluding that three weeks was a reasonable time under the circumstances, the court noted (1) the large sum of money involved, (2) the unusual nature of the agreement, and (3) the necessity of determining the potential resale value of the subject property in order to evaluate the value of the agreement. *Id.*

In *Rechler,* a New Jersey partnership leased a real estate complex to a savings and loan which was subsequently declared insolvent and placed into RTC's receivership. The institution was merged into a new entity which was then placed under the conservatorship of the RTC on December 8, 1989. The new entity entered into a purchase and assumption agreement with the closed institution giving the new entity an exclusive 120-day option to accept an assignment of the lease agreement from the receiver of the closed institution. The receiver authorized subsequent

extensions of this option, first for thirty days, then for an additional forty-five days, and a third time for sixty days. Before the final period of extension expired, the lessors brought suit seeking a declaratory judgment that RTC had failed to repudiate the lease agreement "within a reasonable period" as required by section 1821(e)(2). The court held that the issue of whether RTC had failed to repudiate within a reasonable period was suitable for summary judgment. The court construed the language of section 1821(e)(2) as "mandatory, not discretionary." RTC argued that the issue of reasonableness was inextricably tied to the decision whether or not to sell the financial institution, and that RTC should be allowed to defer the decision to repudiate the lease as long as the potential existed to sell the institution. In rejecting this argument, the court first noted that there was no evidence that there was a buyer interested in purchasing the lease. The court placed great reliance on an internal RTC memorandum dated June 14, 1989 which indicated that RTC did not anticipate that potential bidders would be interested in the site because of the large financial obligation of the lease. The same internal document acknowledged that a lengthy extension may deprive RTC of the ability to invoke the repudiation power. The court noted:

> RTC analyzed, as the statute requires, whether the [leases were] burdensome. RTC concluded that it was, but decided that it was more beneficial, in the short term, not to fulfill the statutory responsibility that conclusion mandated, *i.e.*, repudiation. RTC made a naked pragmatic calculation. They [sic] felt that given the cost of relocation, it was easier not to act, even if such nonaction violated the statute and in the process condemned the good faith landlord to holding a $60 million claim against a bankrupt estate. This

> cost benefit calculus directly violates RTC's legal obligations under FIRREA.
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> The statute gives the RTC a reasonable length of time to determine the marketability, or lack thereof, of any particular lease. It places an affirmative obligation upon the corporation to act one way or the other. It is an affirmative obligation to act "reasonably."
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> Subsumed within this concept is the notion of fairness, good faith and balance between the needs of the reorganizing corporation and, importantly, the landlord.
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> Just as the corporation is bound to act, the landlord is bound to accept RTC's decision, subject to its statutorily prescribed damages. But the RTC cannot choose its own pragmatic middle path. It cannot stand idly by and consciously watch that reasonable time pass away . . . . It must act and it must live within the consequences of its actions, whether they be good, bad or inconvenient. RTC's policy of avoidance directly contradicts this express statutory responsibility.

Transcript of Opinion at 4.19-4.20. The court emphatically rejected the notion that a reasonable time for repudiation was tied to the decision to close the bank, since the decision whether or not to close an institution was wholly discretionary and subject to change, postponement and extension. *Id.*

The court noted that repudiation was a basic element of

FIRREA and must be exercised "consistently with the Act's design of swiftly bringing order to the chaos of the savings and loan industry." *Id.* at 4.22. The court concluded that reasonableness was, therefore, a "fact sensitive time that will always be chronologically short." *Id.* The court noted that Congress had rejected a previously imposed limit of ninety days, substituting, instead, the more flexible notion of "reasonableness." *See* H.R.Rep. No. 101-54(I), 101st Cong., 1st Sess., *reprinted in* 1989 U.S. Code Cong. & Admin. News 86 (1989). The court quoted the following statement from the legislative history:

> The interests of the American taxpayer demand an expedited resolution to the monumental problems involved with the unprecedented costs of dealing with hundreds of insolvent thrifts and the orderly disposition of the assets of these failed institutions.

Id. The court noted that section 1821(4)(A) and (B) indicate that a receiver may give notice of repudiation on one date and schedule repudiation to become effective on another, thereby giving itself the flexibility necessary to schedule a withdrawal from the leased premises over a reasonable period of time. In summary, the court concluded:

> [A] reasonable period of time will always be fact sensitive, but it will always have certain common characteristics. It must be a chronologically short period in order to serve Congress' intent of swiftly bringing order to the failed institution. It should always occur approximately 90 days after appointment subject to any situation relevant to

> the determination of whether a particular lease is burdensome.

Rechler, Transcript of Opinion at 4.28.[5]

Cedarminn argues that the nineteen-month delay between the appointment of the FSLIC as conservator of Midwest Federal on February 13, 1989, and the decision to repudiate in October of 1990, was "unreasonable" within the meaning of FIRREA, and that the Court should therefore declare the repudiation invalid. Even if the Court finds that the reasonable time in which to repudiate did not begin to run until August 9, 1989, upon passage of FIRREA, Cedarminn urges that the fourteen months between August of 1989 and October of 1990 was also excessive. Cedarminn argues that FSLIC should have determined whether or not to repudiate the lease agreements shortly after its appointment in February of 1989, and that the decision should have been made not later than immediately following passage of FIRREA. Cedarminn stresses the admissions in internal RTC documents indicating that RTC determined in June of 1989 that the leases were burdensome, and admitted in January of 1990 that the reasonable period in which to repudiate had probably expired.

In response to Cedarminn's contention that RTC waited an

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5. Having concluded that a reasonable time had passed, the court turned itself to the question of remedy. Interestingly, the court did not bar RTC from exercising its repudiation right, but granted RTC six days from the date of the opinion in order to exercise the repudiation right. *Id.* at 4.29. Here, RTC does not dispute Cedarminn's contention that the "reasonableness" requirement is a condition precedent to exercise of the repudiation power and agrees that if the time before exercise of the power is found to have been unreasonable, the power is forfeited.

unreasonable period of time in which to repudiate, RTC argues that as long as MSA was in the hands of a "conservator," the intention of the conservator was to carry on the institution's business and preserve its assets, which plan is inconsistent with repudiation of the lease agreements. RTC stresses that FSLIC, then RTC, acted as conservator of MSA between May of 1989 and October of 1990 and as such sought to carry on the business of MSA. This policy, according to RTC, meant that it would not be in MSA's best interest to repudiate the leases. Rather, RTC claims it attempted to negotiate with Cedarminn to resolve the issues proposed by the burdensomeness of the leases so that it could sell the institution with the leases in place. RTC argues that only after it was unable to renegotiate the leases and/or find acceptable buyers was the decision made to liquidate the institution. Once liquidation became the plan for the bank, it became necessary to appoint RTC as receiver. It was from this point that RTC claims that it was required to make a decision concerning repudiation within a "reasonable time." RTC argues that even if the fourteen months between August of 1989 and October of 1990 was not "reasonable" within the meaning of the Act, its appointment as "receiver" of MSA on October 5, 1990 revived its otherwise expired ability to repudiate.

The Court cannot accept this reasoning. RTC's arguments fly in the face of the language of the statute. The timing provision provides:

> The *conservator or receiver* appointed for any insured depository institution in accordance with subsection (c) of this section *shall* determine whether or not to exercise the rights of repudiation under this subsection within a reasonable period following *such appointment*.

12 U.S.C. § 1821(e)(2) (emphasis added). It is clear that the statute requires either the conservator *or* the receiver, whichever is appointed, to make the repudiation determination within a reasonable period following *its* appointment. Thus, RTC, when it succeeded to FSLIC's position as conservator in August of 1989, was then required to make a decision as conservator whether or not to repudiate the lease agreements. Indeed, in *Union Bank, supra,* RTC was acting in its role as *conservator* when it made the decision to repudiate. Thus, the Court concludes that in determining what is a "reasonable period of time" in which to repudiate, the Court must begin with RTC's appointment as conservator and the passage of FIRREA in August of 1989.[6]

Assuming, then, that the pertinent period of examination is from August of 1989 to October of 1990, the issue is whether this delay of fourteen months was "reasonable" under all the facts and circumstances of the particular case. Cedarminn persuasively argues, based upon internal MSA and RTC documents, that RTC made the decision as early as June of 1989 that the leases were unduly burdensome and required either modification or repudiation. Nevertheless, the decision on repudiation was deferred until October of 1990 while RTC sought to renegotiate the leases, using the threat of repudiation as a leverage over those negotiations. Cedarminn argues that, as the court stated in *Rechler*, use of the repudiation power was not intended in this manner, and that RTC's actions reflect bad faith and therefore unreasonable delay as a matter of law.

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6. While the Court will consider the "reasonable time" period to have commenced upon passage of FIRREA in August 1989, there appears to be merit to Cedarminn's argument that FSLIC had the power to repudiate prior to the enactment of FIRREA, and therefore the express provision of this power in FIRREA should have come as no surprise in August.

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The Court finds that RTC acted unreasonably in deferring the repudiation decision until October of 1990, when it is clear that it determined that the leases were unduly burdensome as early of June of 1989, and likely sooner. While the Court does not find it unreasonable that RTC first tried to renegotiate the leases and sell the institution with the leases intact, it appears that FIRREA requires the RTC to make the hard decision whether or not to repudiate before the decision is made to liquidate, *i.e.*, upon appointment of either a conservator *or* a receiver. The fact that Congress rejected an express limit of ninety days in which to repudiate indicates that some flexibility must be reserved to the RTC. However, the Court is aware of no case, either before or after the enactment of FIRREA, in which a delay of fourteen months before deciding whether or not to repudiate a lease was found reasonable.[7] Even given the amount of money involved in the transaction, and the complexity of the negotiations, it appears that fourteen months was an unreasonable period to delay the decision to repudiate. Clearly, a key purpose behind FIRREA was the *expeditious* resolution of the savings and loan crisis. H.R.Rep. No. 101-54(I), 101st Cong., 1st Sess., *reprinted in* 1989 U.S. Code Cong. & Admin. News 86 (1989). It appears that it was for this reason that Congress required the receiver or conservator to make the repudiation decision within a "reasonable time" following its appointment. RTC has failed to explain why the fourteen-month delay was reasonable or necessary under all the circumstances, and the Court finds that it was not.

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7. Of the pre-FIRREA cases cited above, none turned upon the issue of reasonable time.

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II. *Whether Cedarminn is Entitled to Draw Against the Letter of Credit Naming it as Beneficiary*

Cedarminn argues that if the Court rules that the repudiation was untimely, it is entitled to draw against the letter of credit issued by the Federal Home Loan Bank naming Cedarminn as beneficiary. As noted above, pursuant to the lease agreements between Cedarminn and Midwest Federal, Midwest Federal arranged for the Federal Home Loan Bank to issue two letters of credit totaling approximately $11.8 million. Section 43 of the 1985 lease-agreement entitled "Security Provisions" provided that as security for Midwest Federal's performance of its obligations under the lease, Midwest Federal was to provide Cedarminn with

> a clean irrevocable [letter] of credit from the Federal Home Loan Bank . . . . Such letters of credit shall . . . be payable against sight draft in the amount necessary to reimburse landlord for the cure of any default hereunder or for damages to which landlord is entitled hereunder. Such draft, along with landlord's affidavit of default shall be deemed proof positive of landlord's entitlement thereto.

Cedarminn's Complaint Exh. D at 47. The 1986 lease contained an identical provision. *See* Cedarminn Complaint Exh. J at 48. The letter of credit in turn provides that the Federal Home Loan Bank agrees "that all drafts drawn under and in compliance with the terms of this Letter of Credit will be duly honored by us upon delivery of the certificate(s), as specified, if presented at such office on or before the expiration date hereof." Cedarminn Complaint Exh. F. The letter also incorporates by reference the Uniform

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Customs and Practice for Documentary Credits (1983 Revision), International Chamber of Commerce, Publication Number 400, and designates Iowa law as governing. The letter of credit concludes as follows:

> This letter of credit sets forth in full our undertaking, and such undertaking shall not in any way be modified, amended, amplified, or limited by reference to any document, instrument or agreement referred to herein except only the certificates and the sight drafts referred to herein; and any such reference shall not be deemed to incorporate herein by reference any document, instrument or agreement, except for such certificates and such sight drafts.

Cedarminn Complaint Exh. F. The certificate attached as exhibit A to the letter provides for the beneficiary to certify that the payee is making a draw under the letter of credit "with respect to the payment of amounts *due* it . . . ." *Id.* (Emphasis added.)

Cedarminn argues that RTC's October 29, 1990 notice of intention to repudiate effective February 28, 1991 constitutes a default under the lease agreements entitling Cedarminn to draw upon the letters of credit, even if RTC continues to make required lease payments. RTC contends that if the Court rejects the repudication as untimely, it intends to continue making lease payments under the lease at least until it has exhausted its appeals on the repudiation issue. RTC argues that Cedarminn cannot draw under the letter of credit because the lease agreements provide for such draw only in the event of "default" or as compensation

for "damages," neither of which event has occurred or will occur as long as RTC continues making payments.

In response, Cedarminn contends that the Court has no authority to enjoin a draw against the letter of credit, based on established law governing letters of credit. Cedarminn relies upon the well-established principles that a letter of credit constitutes an independent obligation between the issuing bank and the beneficiary, and that the rights and duties of the bank and the beneficiary are not conditioned upon the state of the contract between the bank's customer and the beneficiary. *See First National Bank of Council Bluffs v. Rosebud Housing Authority*, 291 N.W.2d 41, 44 (Iowa 1980). Article V of the Uniform Commercial Code, in force under Iowa law, provides:

> An issuer must honor a draft or demand for payment which complies with the terms of the relevant credit regardless of whether the goods or documents conform to the underlying contract for sale or other contract between the customer and the beneficiary.

Iowa Code § 554.5114(1).

Cedarminn also relies upon a series of cases in the bankruptcy context which have held that the trustee of a bankrupt letter of credit customer cannot enjoin a draft against a letter of credit by virtue of the customer's insolvency. *See Lower Brule Construction Co. v. Sheesley's Plumbing & Heating Co.*, 84 Bankr. 638, 644-45 (Bankr.D.S.D. 1988); *In re San Jacinto Glass Industries, Inc.*, 93 Bankr. 934, 937 (Bankr.S.D.Tex. 1988); *In re Leisure Dynamics, Inc.*, 33 Bankr. 171, 172-73 (Bankr.D.Minn.

1983). These courts have concluded that proceeds of a letter of credit are not part of the bankrupt's estate and are therefore beyond the power of the bankruptcy court to enjoin actions for possession of property of the estate. *See, e.g., Lower Brule*, 84 Bankr. at 644.

Plaintiff distinguishes the above cases by arguing that if it continues to make payments under the lease there would be no underlying debt owing between the customer and the beneficiary, while in the bankruptcy context the issue is whether holders of debt properly due and owing could foreclose on letters of credit rather than file claims against the bankrupt's estate. Here, RTC argues that Cedarminn has no basis for claiming against the letter of credit if it continues making lease payments. Any claim, RTC reasons, would necessarily be false based on the underlying contract between Midwest Federal and Cedarminn.

Cedarminn ignores a significant argument on the part of RTC that the UCC expressly authorizes a suit by a letter of credit customer to enjoin an issuer from paying on a letter of credit. As noted above, Iowa Code § 554.5114(2)(b) provides that "an issuer acting in good faith may honor the draft or demand for payment despite notification from the customer of fraud, forgery or other defect not apparent on the fact of the documents *but a court of appropriate jurisdiction may enjoin such honor*" unless the presenter is a holder in due course pursuant to Iowa Code § 554.3302 (emphasis added). Numerous courts have construed this provision as an exception to the principle that letters of credit are independent of the obligations between the customer and the beneficiary. *See Shaffer v. Brooklyn Park Garden Apartments*, 250 N.W.2d 172 (Minn. 1977); *Griffin Companies, Inc. v. First National Bank of St. Paul*, 374 N.W.2d 768, 771 (Minn.Ct.App. 1985) (affirming injunction against fraudulent certification by

beneficiary under letter of credit, applying *Shaffer*); *Harris Corp. v. National Iranian Radio*, 691 F.2d 1344, 1355 (8th Cir. 1982) (misrepresentation concerning performance of underlying contract sufficient basis for injunction against draw upon letter of credit, citing *Shaffer*); *First Commercial Bank v. Gotham Originals, Inc.*, 486 N.Y.S.2d 715, 719 (N.Y. 1985) (when a required document is forged or fraudulent or there is fraud in the transaction, a customer may enjoin an issuer from honoring a draft under a letter of credit if the issuer fails to do so on its own unless the person presenting a draft drawn on a letter of credit is a holder in due course. *Mitsui Manufacturers Bank v. Texas Commerce Bank - Fort Worth*, 206 Cal.Rptr. 218 (Cal. App. 1984) (Commercial Code does not prohibit injunction against beneficiary from drawing against letter of credit); *cf. Jupiter Orrington Corp. v. Zweifel*, 469 N.E.2d 590 (Ill.App. 1984) (false statement by beneficiary that default occurred not sufficient basis for injunction against presentment of letter of credit; fraud sufficient to vitiate letter of credit must relate to formation of the underlying contract).

In *Shaffer*, purchasers of a letter of credit sought to enjoin the beneficiaries from making presentment. The letter of credit was part of a limited partnership agreement whereby two of the limited partners purchased their units under an agreement providing for an initial cash payment with the balance secured by promissory notes. The letter of credit was intended to guarantee payment of the promissory notes upon occurrence of two particular conditions precedent. The letter of credit provided that payment would be made thereunder upon certification by the beneficiary that amounts were due and payable because of the limited partners' failure "to meet payment of authorized loans which are payable." *Shaffer*, 250 N.W.2d at 175.

The letter of credit was then transferred by the beneficiary

to a second bank, Wayzata Bank & Trust Co., as security for an additional series of loans relating to the real estate project which was the subject of the limited partnership agreement. When the project faced financial difficulty, the limited partners feared that their letters of credit would be foreclosed by the Wayzata Bank and therefore notified Wayzata Bank that demand could not be made under the letters of credit because the two conditions precedent to payment had not occurred. Nevertheless, the initial beneficiary prepared a draft under the letter of credit then negotiated the draft to Wayzata Bank. Wayzata Bank then made a presentment to the issuing bank along with a certification from the original beneficiary that the limited partners had failed to meet their obligations.

The limited partners sued alleging that the certifications were false. The court held that a letter of credit was not in itself a negotiable instrument under Minn. Stat. § 336.3-104(1) since it is not payable to order or bearer and subject to conditions precedent. *Id.* at 176-77. Further, the court noted that the letters of credit did not expressly state that they were assignable and that Wayzata Bank was not therefore vested with the right to draw drafts but only with the right to receive the proceeds thereunder. Accordingly, the court held that Wayzata Bank could not become a holder in due course merely by accepting the letters of credit as security for its loans to the initial beneficiary. The court found that injunctive relief was appropriate in order to protect the purchaser of the letter of credit from fraud on the part of the beneficiary:

> by seeking an injunction where it is appropriate under that statute, a customer relieves the issuer of the necessity of making a factual determination under difficult circumstances. This shifts the

> decision making burden to the court which must balance the desirability of protection of the customer from the beneficiary's fraud against maintenance of the letter of credit as a commercial instrument and business device. . . . It should be noted that where injunctive relief is sought, the fraud alleged must be in respect to the documents presented and not as to the underlying transaction. *The allegation of fraud made by Shaffer and Severson is appropriate for injunctive relief since it concerns the certifications by Brooklyn Park presented by Wayzata.*

Id. at 180 (emphasis added). The court relied upon *Sztejn v. Schroder Banking Corp.*, 31 N.Y.S.2d 631 (N.Y. 1941) in which the court held that injunctive relief was appropriate to prevent a fraudulent draw against a letter of credit where the beneficiary's fraud was called to the issuer's attention before the draft was paid. The court also relied upon *Dynamics Corp. of America v. Citizens & Southern National Bank*, 356 F.Supp. 991 (N.D. Ga. 1973) in which the court held that the procurer of a letter of credit was entitled to an injunction restraining a bank from honoring a letter of credit where the certificate accompanying the draw was fraudulent. The court in *Shaffer* noted that denial of injunctive relief would leave the procurers of the letter of credit with no recourse against the beneficiary in light of the beneficiary's admitted financial difficulties. Accordingly, the court instructed the trial court to issue a temporary injunction pending trial on the merits. *Shaffer*, 250 N.W.2d at 182. *Accord Itek Corp. v. First National Bank of Boston*, 730 F.2d 19, 24 (1st Cir. 1984) (following *Shaffer*).

RTC does not deny that Iowa law governs letters of credit

currently before the Court. In *First National Bank of Council Bluffs v. Rosebud Housing Authority,* 291 N.W.2d 41 (Iowa 1980), the court considered whether a bank which issued a letter of credit was entitled to dishonor a draft against the credit because the underlying contract which the letter of credit secured had been modified by the parties. In reviewing letter of credit law, the court noted that a letter of credit comprises one of three distinct contracts, the first being between the bank and the beneficiary, the second between the customer of the bank and the bank relating to the issuance of the letter, and the third being the contract between the beneficiary and the bank's customer. According to the court, these three agreements "while functionally related and comprising elements of an overall transaction, are entirely separate and distinct from one another as a matter of law." *Id.* at 44, *quoting* H. Harfield, *Bank Credits and Acceptances,* 30 (5th ed. 1974). The court noted that "the key to the commercial vitality and function of a letter of credit is that the issuing bank's promise is independent of the underlying contracts, and the bank should not resort to them in interpreting a letter of credit." *Id.* The court noted that the principle of the letter as an independent promise has been uniformly applied and enforced. *Id.* The court rejected the bank's reliance on the following subdivision of section 554.5114:

> In all other cases as against its customer, an issuer acting in good faith may honor the draft or demand for payment despite notification from the customer of fraud, forgery or other defect not apparent on the face of the documents *but a court of appropriate jurisdiction may enjoin such honor.*

Iowa Code § 554.5114(2)(b) (emphasis added). The bank argued that it could not be determined to be acting in "good faith" when it had knowledge that the underlying contracts had been amended.

The court rejected this argument, however, holding that the fact that the contract appended to the letter of credit "no longer represented the agreement of the parties in every respect is immaterial." *Council Bluffs,* 291 N.W.2d at 46. The court noted, however, that the present action was not "in the form of an action to enjoin payment of the draft, brought by [the customer]." *Id.* at 47, *citing Shaffer.*

The Court cannot accept Cedarminn's argument that RTC's unsuccessful attempt to employ the repudiation power established in FIRREA, in and of itself, constitutes a default entitling Cedarminn to the proceeds of the letter of credit. The Court interprets the provisions governing repudiation of leases set forth in 12 U.S.C. § 1821(e) to demonstrate Congress' intent that RTC in exercising its rights of repudiation not be subject to any penalty provision contained in a lease agreement. The Court does not believe that Congress intended in Section 1821(e) to penalize RTC as a result of an unsuccessful but good faith attempt to repudiate a lease. If RTC continues to make lease payments under the lease, Cedarminn can claim no default or entitlement to damages under the letter of credit by virtue of RTC's attempted repudiation. Therefore, it appears that any certification on the part of Cedarminn to the Federal Home Loan Bank that there is some amount "due" it pursuant to the lease agreements with Midwest by virtue of the repudiation would appear to have no factual basis. Were Cedarminn to be allowed to collect under the letter of credit, it appears that RTC would have an action against Cedarminn for wrongful presentment. *See* Iowa Code § 554.5114, Official Comment Number 2 (where documents are forged or fraudulent bank may honor them but "in the event of honor, an action by the customer against the beneficiary will lie by virtue of . . . the underlying contract"). Allowing Cedarminn to make a draft against a letter of credit when there is no factual basis for doing

so would appear to serve no purpose, and, indeed, would cause irreparable harm to RTC should the funds disbursed to Cedarminn be attached by Cedarminn's creditors.

It appears that under prevailing letter of credit law, issuance of an injunction is appropriate, at least as to Cedarminn. The Iowa case cited by Cedarminn is distinguishable in that the court expressly noted that it was *not* faced with "an action to enjoin payment of the draft, brought by [the customer]." *Council Bluffs,* 291 N.W.2d at 46. Indeed, the court citing *Shaffer* in support of this proviso.

Moreover, the Court agrees with the RTC that the situation in the instant case is distinguishable from those arising in the bankruptcy context where a creditor seeks to draw against a letter of credit securing an undisputed obligation of the debtor to the creditor arising prior to the bankruptcy. Here, assuming RTC continues to make lease payments, there would be no factual basis for a claim of default under the letter of credit. In such a situation, to allow the draft to occur would be to allow the letter of credit device to be used to effectuate fraud. Courts in such circumstances have not hesitated to issue injunctive relief. *Shaffer; Gotham Originals; Harris; Griffin.*

Cedarminn argues that by seeking to bar Cedarminn's use of the letter of credit it is interfering with a perfected security interest. Section 1821(e)(11) of 12 U.S.C. provides:

> No provision of this subsection shall be construed as permitting the avoidance of any legally enforceable or perfected security interest in any of the assets of any depository institution except where such an interest is taken in

> contemplation of the institution's insolvency or with the intent to hinder, delay, or defraud the institution or the creditors of such institution.

Cedarminn's argument is without merit. If RTC continues to make these payments, Cedarminn has no basis to claim entitlement to foreclose whatever security interest it has in the letter of credit.

Cedarminn's arguments concerning the importance of preserving the letter of credit as a reliable commercial instrument are misplaced. This is not a situation in which a bank has refused to honor a presentment because of concerns relating to the underlying agreement between the beneficiary and the customer. In such a situation, it is necessary to hold the issuing bank to a strict standard of compliance with the letter of credit in order to protect its worth as a guarantee of the underlying contract. Here, in contrast, it is clear that if RTC continues to make lease payments, there will be no default justifying a draw. In such a scenario, no point is served by sitting back and allowing Cedarminn to receive the proceeds of a letter of credit to which it has no legal entitlement, and the UCC expressly provides for an injunction to avoid such a result. Accordingly, the Court will grant RTC's motion for summary judgment to the extent RTC seeks to enjoin Cedarminn from making a draft under the letter of credit based on a certification that RTC is in default under the leases by virtue of RTC's attempted repudiation, as long as RTC continues to make all required lease payments, and is not in default.

III. *Whether an Injunction May Issue as to the Letter of Credit Held by Chemical Bank*

As noted above, Chemical Bank is the named beneficiary of the $6.8 million letter of credit. Chemical Bank claims that

it issued two letters of credit to Cedarminn naming Midwest as beneficiary in August of 1986 in return for a letter of credit from the Federal Home Loan Bank naming Chemical Bank as beneficiary. Apparently, this was the $5.33 million letter of credit issued in 1985. When it loaned additional funds to Cedarminn in August of 1988, Chemical Bank claims that it received the $6.8 million letter of credit in its place which was renewed on August 30, 1990. Chemical Bank argues that the letter of credit between the Federal Home Loan Bank and Chemical Bank is a separate and distinct obligation unrelated to the lease agreement between Midwest and Cedarminn.

Chemical Bank is correct. There is no indication that any draw on the part of Chemical Bank against the letter of credit would be fraudulent, inasmmuch as the agreement between Chemical Bank and Cedarminn precipitating the letter of credit is not before the Court in this case. On the record before the Court, there is no basis for enjoining Chemical Bank's draw against the letter of credit naming it as beneficiary. Accordingly, RTC's motion for summary judgment will be denied as to the Chemical Bank letter of credit and Chemical Bank's motion for summary judgment will be granted.

Accordingly, based on the foregoing, and upon all the files, records and proceedings herein,

IT IS ORDERED that:

1. Cedarminn's motion for summary judgment is granted in part to the extent it seeks a determination that RTC's repudiation of the lease agreements was untimely and therefore invalid;

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2. RTC's motion for summary judgment is granted in part as follows: so long as RTC continues to make all required lease payments under the leases and is not in default, Cedarminn is hereby enjoined from drawing against the letter of credit naming it as beneficiary based on a claim that RTC's repudiation constituted an event of default;

3. Chemical Bank's motion for summary judgment is granted and RTC's motion for summary judgment is denied to the extent it seeks an order enjoining Chemical Bank from enforcing the letter of credit naming it as beneficiary.

s/ Harry H. MacLaughlin
Judge Harry H. MacLaughlin
United States District Court

Dated: March 4, 1991

APPENDIX D — ORDER OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MINNESOTA, FOURTH DIVISION DATED MARCH 5, 1991

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA
FOURTH DIVISION

CIVIL 4-90-828

Resolution Trust Corporation, as Receiver for Midwest Savings Association, F.A.,

Plaintiff,

v.

Cedarminn Building Limited Partnership, a Minnesota limited partnership; Cedar Minn Realty Corp., its general partner; Minncedar Land Limited Partnership; MidUnited Building Company Limited Partnership, a Minnesota limited partnership; Midrock Land Corp., its general partner; Rockminn Leasing Corp.; Cedarminn Building Partnership, a Minnesota limited partnership, Chemical Bank; Norstar Bank and Federal Home Loan Bank of Des Moines,

Defendants.

CIVIL 4-90-829

Cedarminn Building Limited Partnership, a Minnesota limited partnership; Minncedar Land Limited Partnership, a Minnesota limited partnership; Midunited Building Limited Partnership, a Minnesota limited partnership; and Rockminn Leasing Corp., a Minnesota corporation,

Plaintiffs,

Appendix D

v.

Resolution Trust Corporation, a government corporation, and in its capacity as Receiver of Midwest Federal Savings and Loan Association of Minneapolis and as Conservator and Receiver for Midwest Savings Association, F.A.; Midwest Federal Savings and Loan Association of Minneapolis, in Receivership; and Midwest Savings Association, F.A., in Receivership and Conservatorship,
Defendants.

John R. Yanish, Bradley J. Martinson, Petersen, Tews & Squires, 4800 IDS Center, 80 South Eighth Street, Minneapolis, MN 55402-2208, for Resolution Trust Corporation, for receiver of Midwest Federal Savings and Loan Association of Minneapolis, and for Receiver and Conservator of Midwest Savings Association, F.A.

Robert R. Weinstine, Steven C. Tourek, Gina M. Grothe, Winthrop & Weinstine, 3200 Minnesota World Trade Center, 30 East Seventh Street, St. Paul, MN 55101; Roger B. Kaplan, Wilentz, Goldman & Spitzer, P.A., 90 Woodbridge Center Drive, P.O. Box 10, Woodbridge, NJ 07095, for Cedarminn Building Limited Partnership, Minncedar Land Limited Partnership, and Midunited Building Limited Partnership, Rockminn Leasing Corp.

Donald C. Macdonald, Robert L. Schnell, Jr., Faegre & Benson, 2200 Norwest Center, 90 South Seventh Street, Minneapolis, MN 55402-3901, for Chemical Bank.

Dale M. Wagner, Wayne A. Hergott, Moss & Barnett, 4800 Norwest Center, 90 South Seventh Street, Minneapolis, MN 55402, for defendant Federal Home Loan Bank of Des Moines.

Appendix D

The order of this Court in the above matter dated March 4, 1991 contains two typographical errors which are hereby corrected as follows:

1. On page 21 of the order in the line immediately preceding the indented quotation the letters "RTC" should be deleted and the word "Cedarminn" substituted therefor.

2. Ir the last line of page 22 of the order the word "Cedarminn" should be deleted and the letters "RTC" should be substituted therefor.

s/ Harry H. MacLaughlin
Judge Harry H. MacLaughlin
United States District Court

DATED: March 5, 1991

APPENDIX E -- ORDER OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MINNESOTA, FOURTH DIVISION DATED APRIL 25, 1991

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA
FOURTH DIVISION

CIVIL 4-90-828

Resolution Trust Corporation, as Receiver for Midwest Savings Association, F.A.,

Plaintiff,

v.

Cedarminn Building Limited Partnership, a Minnesota limited partnership; Cedar Minn Realty Corp., its general partner; Minncedar Land Limited Partnership; MidUnited Building Company Limited Partnership, a Minnesota limited partnership; Midrock Land Corp., its general partner; Rockminn Leasing Corp.; Cedarminn Building Partnership, a Minnesota limited partnership; Chemical Bank, Norstar Bank and Federal Home Loan Bank of Des Moines,

Defendants.

CIVIL 4-90-829

Cedarminn Building Limited Partnership, a Minnesota limited partnership; Minncedar Land Limited Partnership, a Minnesota limited partnership; Midunited Building Limited Partnership, a Minnesota limited partnership; and RockMinn Leasing Corp., a Minnesota corporation,

Plaintiffs,

Appendix E

v.

Resolution Trust Corporation, a government corporation, and in its capacity as Receiver of Midwest Federal Savings and Loan Association of Minneapolis and as Conservator and Receiver for Midwest Savings Association, F.A.; Midwest Federal Savings and Loan Association of Minneapolis, in Receivership; and Midwest Savings Association, F.A., in Receivership and Conservatorship,
Defendants.

John R. Yanish, Bradley J. Martinson, Petersen, Tews & Squires, 4800 IDS Center, 80 South Eighth Street, Minneapolis, MN 55402-2208, for Resolution Trust Corporation, for receiver of Midwest Federal Savings and Loan Association of Minneapolis, and for Receiver and Conservator of Midwest Savings Association, F.A.

Robert R. Weinstine, Steven C. Tourek, Gina M. Grothe, Winthrop & Weinstine, 3200 Minnesota World Trade Center, 30 East Seventh Street, St. Paul, MN 55101; Roger B. Kaplan, Wilentz, Goldman & Spitzer, P.A., 90 Woodbridge Center Drive, P.O. Box 10, Woodbridge, NJ 07095, for Cedarminn Building Limited Partnership, Minncedar Land Limited Partnership, and Midunited Building Limited Partnership, Rockminn Leasing Corp.

Donald C. Macdonald, Robert L. Schnell, Jr., Faegre & Benson, 2200 Norwest Center, 90 South Seventh Street, Minneapolis, MN 55402-3901, for Chemical Bank.

Dale M. Wagner, Wayne A. Hergott, Moss & Barnett, 4800 Norwest Center, 90 South Seventh Street, Minneapolis, MN 55402, for defendant Federal Home Loan Bank of Des Moines.

Appendix E

This matter is before the Court on the motion of the Resolution Trust Corporation (RTC) pursuant to Federal Rule of Civil Procedure 62(c) and Federal Rule of Appellate Procedure 8 to enjoin Cedarminn from further disposing of the proceeds of irrevocable letters of credit numbers 2150-N90100201 and 2150-N90083001 in the total amount of $11.8 million drawn from the Federal Home Loan Bank of Des Moines on April 21, 1991, and finding Cedarminn in contempt of this Court's previous order in this matter.

This matter was previously before the Court on cross motions for summary judgment. The Court held three hearings on these motions. At the last of these hearings, on February 27, 1991, the Court indicated how it would rule in a written order to follow. Transcript at 30-31. The Court determined that the RTC's repudiation of leases entered into between RTC's predecessor in interest, Midwest Federal Savings & Loan Association, and a group of limited partnerships collectively referred to as "Cedarminn" was untimely and therefore invalid. Midwest Federal's performance of these leases was secured by certain letters of credit issued by the Federal Home Loan Bank of Des Moines. On motion of the RTC, the Court enjoined Cedarminn from drawing against the letter of credit naming it as beneficiary based on a claim that RTC's repudiation constituted an event of default, so long as RTC continued to make all required lease payments under the leases and was not in default. One of the letters of credit named Chemical Bank as beneficiary, not Cedarminn, and for this reason the Court denied RTC's motion for an injunction enjoining Chemical Bank from enforcing the letter of credit naming it as beneficiary. The written order was issued March 4, 1991. That order is now before the United States Court of Appeals for the Eighth Circuit on cross appeals by RTC and Cedarminn.

Appendix E

After the Court announced its ruling in court on February 27, 1991, counsel for Cedarminn asked the following question:

> MR. WEINSTINE: Our view is over and apart from anything in the context of this lawsuit, if there is an independent act of default, which I am representing to you we believe has occurred, then what are the rights of my client?
>
> THE COURT: Now, the independent act of default that you are representing to me that you believe has occurred is this failure to pay some sort of cost of living increase?
>
> MR. WEINSTINE: Yes.
>
> THE COURT: I never heard that, I don't think, until just now.
>
> MR. WEINSTINE: You wouldn't have, because it happened since the time of the January hearing. The period for cure is over. And the acceleration and the rights, and what have you, are all there. In fact, we, we, we have our notices prepared.
>
> THE COURT: Well, I would think, and I'm talking off the top of my head now, but I would think if you have some evidence of default that you think should compel me to allow you to go against these letters of credit, you should bring that to my attention in an appropriate fashion with an appropriate motion.

MR. WEINSTINE: Very well, Your Honor.

Transcript at 32-33. Thus, the Court made it clear that before Cedarminn could make any claim against the letters of credit, it was required to obtain leave of the Court on proper motion. That same conclusion also seems clearly implied from the written language of the Court's order of March 4, 1991.

On April 21, 1991, Chemical Bank assigned its letter of credit to Cedarminn. On April 22, 1991, without having previously obtained leave of the Court, Cedarminn presented draws on the two letters of credit which are the subject of this action. Cedarminn's draws were for the full amount of the letters of credit, $11.8 million. Accompanying the draws were wire instructions directing the Federal Home Loan Bank of Des Moines to wire the funds to Citibank New York, in the account name of Newbridge Securities, Inc. for the benefit of two of the Cedarminn partnerships. Affidavit of Craig L. Nulliner ¶3 and Exh. A, B, C. According to Cedarminn, $1,273,414.06 was then wired to Chemical Bank in payment of a Cedarminn promissory note. Neither party has raised a question about this payment. The details of the present location of the proceeds of the letters of credit are set forth in the attached April 24, 1991 letter from Cedarminn counsel Robert R. Weinstine to the Court which is hereby incorporated by reference.

RTC is now before the Court seeking an order finding that these draws were invalid, and were not authorized by the Court's previous order enjoining Cedarminn from making such draws without obtaining prior Court approval.

On April 23, 1991, the Court heard oral argument from both parties on RTC's motion. Based on these arguments and the

affidavits and memoranda submitted in connection therewith, and upon all the files, records and proceedings in this case, the Court finds that Cedarminn's drafts against the letters of credit without obtaining prior Court approval violate the Court's order. Accordingly, the Court will order Cedarminn to refrain from any further disposition of the proceeds of these letters of credit in any manner or for any purpose until the Court issues an order determining whether RTC is, in fact, in default under the leases and, if so, what damages, if any, have been incurred by Cedarminn.

Pursuant to Fed.R.Civ.P. 62(c), the Court retains jurisdiction to suspend, modify, restore, or grant an injunction during the pendency of an appeal taken from a final judgment upon such terms as the Court considers proper for the security of the rights of the adverse party.

The test for whether preliminary injunctive relief should issue is set forth in *Dataphase Systems, Inc. v. C L Systems, Inc.*, 640 F.2d 109 (8th Cir. 1981). "At base, the question is whether the balance of equities so favors the movant that justice requires the court to intervene to preserve the status quo until the merits are determined." 640 F.2d at 113. Four factors are weighed:

> (1) the threat of irreparable harm to the movant;
>
> (2) the state of balance between this harm and the injury that granting the injunction will inflict on other parties litigant;
>
> (3) the probability that movant will succeed on the merits; and

Appendix E

(4) the public interest.

Dataphase, 640 F.2d at 114.

In order to maintain the status quo to enable the Court to consider RTC's claim that Cedarminn's drafts against the letters of credit were improper, the Court finds it necessary, pursuant to the *Dataphase* analysis, to enjoin Cedarminn from further disposing of the proceeds of the letters of credit until such time as the Court has received full briefing and argument, and such evidence as is necessary, and has issued an order determining the parties' rights in this matter.

Accordingly, based upon the foregoing, and upon all the files, records and proceedings in this case,

IT IS ORDERED that:

1. Cedarminn is hereby preliminarily enjoined from further disposing of the proceeds of letters of credit numbers 2150-N90100201 and 2150-N90083001 in any manner or for any purpose whatsoever until further order of this Court;

2. RTC's motion shall be set on for expedited hearing on Tuesday, April 30, 1991 at 9:30 a.m. Both parties shall submit memoranda attaching whatever affidavits or other evidence counsel deems necessary to a determination of plaintiffs' motion no later than 12:00 noon on Monday, April 29, 1991.

s/ Harry H. MacLaughlin
Judge Harry H. MacLaughlin
United States District Court

DATED: April 25, 1991

APPENDIX F — MEMORANDUM AND ORDER OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MINNESOTA, FOURTH DIVISION DATED MAY 23, 1991

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA
FOURTH DIVISION

CIVIL 4-90-828

Resolution Trust Corporation, as Receiver for Midwest Savings Association, F.A.,

Plaintiff,

v.

Cedarminn Building Limited Partnership, a Minnesota limited partnership; Cedar Minn Realty Corp., its general partner; Minncedar Land Limited Partnership; MidUnited Building Company Limited Partnership, a Minnesota limited partnership; Midrock Land Corp., its general partner; Rockminn Leasing Corp.; Cedarminn Building Partnership, a Minnesota limited partnership, Chemical Bank; Norstar Bank and Federal Home Loan Bank of Des Moines,

Defendants.

CIVIL 4-90-829

Cedarminn Building Limited Partnership, a Minnesota limited partnership; Minncedar Land Limited Partnership, a Minnesota limited partnership; Midunited Building Limited Partnership, a Minnesota limited partnership; and RockMinn Leasing Corp., a Minnesota corporation,

Plaintiffs,

Appendix F

v.

Resolution Trust Corporation, a government corporation, and in its capacity as Receiver of Midwest Federal Savings and Loan Association of Minneapolis and as Conservator and Receiver for Midwest Savings Association, F.A.; Midwest Federal Savings and Loan Association of Minneapolis, in Receivership; and Midwest Savings Association, F.A., in Receivership and Conservatorship,
Defendants.

John R. Yanish, Bradley J. Martinson, Petersen, Tews & Squires, 4800 IDS Center, 80 South Eighth Street, Minneapolis, MN 55402-2208, for Resolution Trust Corporation, for receiver of Midwest Federal Savings and Loan Association of Minneapolis, and for Receiver and Conservator of Midwest Savings Association, F.A.

Robert R. Weinstine, Steven C. Tourek, Gina M. Grothe, Winthrop & Weinstine, 3200 Minnesota World Trade Center, 30 East Seventh Street, St. Paul, MN 55101; Roger B. Kaplan, Wilentz, Goldman & Spitzer, P.A., 90 Woodbridge Center Drive, P.O. Box 10, Woodbridge, NJ 07095, for Cedarminn Building Limited Partnership, Minncedar Land Limited Partnership, and Midunited Building Limited Partnership, Rockminn Leasing Corp.

Donald C. Macdonald, Robert L. Schnell, Jr., Faegre & Benson, 2200 Norwest Center, 90 South Seventh Street, Minneapolis, MN 55402-3901, for Chemical Bank.

Dale M. Wanger, Wayne A. Hergott, Moss & Barnett, 4800 Norwest Center, 90 South Seventh Street, Minneapolis, MN 55402, for defendant Federal Home Loan Bank of Des Moines.

Appendix F

This matter is before the Court on a motion by Resolution Trust Corp. for injunctive relief to preserve the status quo while an appeal is pending.

FACTS

The background to this case is more completely set forth in the Court's Memorandum and Order dated March 4, 1991. In summary, this case involves "sale/leaseback" transactions by which Midwest Federal Savings & Loan Association, now under the receivership of the Resolution Trust Corporation, sold nineteen branch locations to a group of investment partnerships (hereinafter collectively referred to as Cedarminn) at apparently above market sale prices with an agreement by Midwest Federal to lease these offices back at what were apparently above-market rental rates. Midwest Federal financed the partnership's purchase of the branches with its own funds. Midwest Federal's performance under the leases was secured by letters of credit in the aggregate amount of $11.8 million. Apparently, the deal was motivated by a desire by Midwest Federal to record significant short-term earnings and inflate its regulatory capital in a time of financial crisis.

On October 29, 1990, RTC notified Cedarminn of its intention to repudiate the leases effective February 28, 1991, pursuant to the Financial Institutions Reform, Recovery and Enforcement Act (FIRREA), 12 U.S.C. § 1821(e). At that time, RTC tendered to Cedarminn all rentals owing through the effective date of the repudiation, in accordance with section 1821(e).

On October 30, 1990, RTC and Cedarminn both filed complaints in this Court. In its complaint RTC sought a declaratory judgment that its repudiation was lawful, and an order enjoining Cedarminn from drawing against the letters of credit.

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Cedarminn's complaint sought a declaratory judgment that RTC's repudiation was contrary to FIRREA, and allowing Cedarminn to draw on its letters of credit by virtue of RTC's default under the leases. RTC then moved for summary judgment in both cases, and Cedarminn moved for summary judgment in both cases on the issue of its rights under the letters of credit.

By order dated March 4, 1991, the Court found that RTC's repudiation of the lease agreements was untimely and therefore invalid under FIRREA, 18 U.S.C. § 1821(e), subd. 2. However, RTC indicated that it intended to continue to comply with the lease provisions pending an appeal to the United States Court of Appeals for the Eighth Circuit on the issue of repudiation. The Court therefore enjoined Cedarminn from drawing against the letter of credit naming it as beneficiary based on a claim that RTC's repudiation constituted an event of default, so long as RTC continued to make all required lease payments under the leases and was not otherwise in default. Memorandum and Order dated March 4, 1991 at 34. For the convenience of the parties, an oral version of the March 4, 1991 written order was announced from the bench at a hearing on February 27, 1991. At that time, in response to a question from the attorney for Cedarminn, the Court advised Cedarminn that if it had any evidence of default entitling it to draw against the letters of credit after issuance of the Court's order, it should bring such evidence to the Court's attention with an appropriate motion. Tr. at 32-33.

Mr. Weinstine, on behalf of Cedarminn asked:

> Your Honor, so that we don't have a bunch more questions, and the Court has been kind enough to see us so many times on short notice, I guess my question is this:

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> Our view is over and apart from anything in the context of this lawsuit, if there is an independent act of default, which I am representing to you we believe has occurred, then what are the rights of my client? Tr. at 32.

The Court responded:

> Well, I would think, and I'm talking off the top of my head now, but I would think if you have some evidence of default that you think should compel me to allow you to go against these letters of credit, you should bring that to my attention in an appropriate fashion with an appropriate motion. Tr. at 33.

Mr. Weinstine, on behalf of Cedarminn, responded to this instruction,

> "Very well, Your Honor." *Id.*

Both parties appealed the Court's March 4 order. Those appeals are now pending.

After the complaints were filed in this action, the parties negotiated a stipulated stand fast agreement and schedule for expedited discovery which was signed by both parties as well as the Court on November 6, 1990. Pursuant to this agreement, Cedarminn accepted the rental payments tendered by RTC for rent due through February 28, 1991 and agreed to make monthly mortgage payments to RTC for the same period. The parties further agreed that the letters of credit would not be presented for payment before February 28, 1991. The agreement also

discussed what the relationship should be between Cedarminn or RTC regarding the present occupants of the branch offices (hereinafter occupants) who had purchased the deposits previously held by Midwest Federal. RTC agreed to permit the occupants to occupy the premises through February 28, during which period Cedarminn would negotiate with the occupants for long-term new leases.[1] RTC agreed to "consent in good faith to commercially reasonable terms and/or market rate rentals" which would be negotiated with the occupants by Cedarminn. Stipulated Order at ¶ 6.

When the first stand fast agreement expired, the parties attempted to negotiate for a new stand fast agreement, but no agreement resulted. On March 1, 1991, RTC failed to pay rent due under the prime leases. On that date, Cedarminn provided written notice of default to RTC as required by the prime leases, and within the cure period provided by the prime leases, RTC made full payment of the annual rent, thereby curing its default.

On April 1, 1991, RTC again failed to make its rent payment, and on April 3 notices of default were again sent to RTC with a cure date of April 17, 1991.

Until March 1, 1991, the occupants of the branches were not required to pay rent to Cedarminn, since full rent had been paid by RTC through February 28, 1991.[2] For the month of March

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1. Throughout this memorandum opinion, the Cedarminn-Midwest Federal-RTC leases will be referred to as the "prime leases," and the present Cedarminn-occupant leases as the "new leases."

2. According to RTC, the new leases with the occupants were written with Cedarminn as lessor because RTC is the mortgagee of the properties and (Cont'd)

1991, Cedarminn received full rental payments both from the occupants under the new leases and from RTC under the prime leases. On April 17, 1991, RTC sought to rectify what it considered overpayment to Cedarminn by paying to Cedarminn the difference between what it owed under the prime leases and the amount Cedarminn was receiving from the occupants under the new leases.

RTC calculated that the occupants were scheduled to pay $73,463.08 per month pursuant to the new leases with Cedarminn. Therefore, in making its April payment, RTC deducted from the $403,239.71 due under the prime leases with Cedarminn, $73,463.08 for the month of April, and the same amount for the month of March, yielding a net RTC payment of $256,313.45.

Cedarminn treated RTC's April 17 payment as a default by RTC under the prime leases. Accordingly, Cedarminn declared the prime leases terminated, immediately obtained assignment of the Chemical Bank letter of credit, and presented drafts against both letters of credit in the full amount of the letters, $11.8 million. Further, on April 20, 1991, Cedarminn made demand upon RTC

(Cont'd)

Cedarminn the record owner. Cedarminn, however, wants to assign the leases to RTC, and is therefore holding rents received pursuant to the new leases in separate accounts to be turned over to RTC, along with assignments of the new leases, on the condition that RTC agrees to indemnify Cedarminn for liability under the new leases, including liability for structural repair, and to pay expenses incurred by Cedarminn relating to the negotiation of the new leases. According to Cedarminn counsel Ronald Zamansky, Cedarminn initially wanted RTC to serve as "landlord/sublessor" under the new leases with the occupants, in RTC's capacity as lessee under the prime leases with Cedarminn. Affidavit of Ronald A. Zamansky ¶ 8. According to Cedarminn, however, RTC feared that serving as landlord/sublessor would be inconsistent with RTC's position that it had repudiated the prime leases, and for this reason the parties agreed that Cedarminn would execute the leases as landlord/sublessor. *Id.*

under the prime leases for more than $80 million as "liquidated and agreed final damages."

In declaring the leases terminated and claiming damages, Cedarminn relied upon the following provisions in the prime leases. Section 24 of the prime leases[3] deals generally with the subject of default. The provision sets forth various events denominated "events of default" including default "in the due and punctual payment of any installment of annual rent payable under this lease or any part thereof [when] such default shall continue for a period of ten business days after notice to cure from the landlord . . . ." Prime Leases § 24.1(i). Section 24.1 provides that if an event of default occurs, landlord may give notice to tenant specifying the event of default and stating that the leases shall expire no sooner than ten business days from the giving of such notice. Section 24.3 provides that following notice of termination to the tenant on the grounds of tenant's default pursuant to section 24.1, landlord may:

> relet the demised premises or any part thereof in the name of Landlord or otherwise, for such term or terms (which may be greater or less than the period which would otherwise have constituted the balance of the term of the lease) and on such conditions (which may include concessions or free rent) as the Landlord, in its uncontrolled discretion, may determine, and may collect and receive the rent therefor. Landlord shall in no way be responsible or liable for any failure to relet the

3. The parallel provision in one of the prime leases, that for the Cedar Street branch, is denominated section 29.

> demised premises or any part thereof, or for any failure to collect any rent due upon any such reletting.

Prime Leases § 24.3.

Section 24.4 provides that termination pursuant to section 24.1 does not relieve tenant of its liability under the lease. Section 24.4 further provides for liquidated current and final damages. The "current" damages clause provides that whether or not the demised premises are relet, tenant is required to pay the landlord annual rent up to the date of termination, and thereafter as follows:

> *[U]ntil the end of what would have been the term of this lease in the absence of such expiration or termination, [tenant] shall be liable to Landlord for, and shall pay the Landlord, as and for liquidated and agreed current damages of tenant's default, the equivalent of the amount of the annual rent and such other sums and charges which would be payable under this lease by tenant if this lease were still in effect,* less the net proceeds, if any, of reletting effected pursuant to the provisions of section 24.3 after deduction all of the Landlord's [sic] reasonable expenses in connection with such reletting. Landlords expenses for the purpose of calculating the foregoing deduction shall include without limitation all reasonable repossession costs, brokerage and management commissions, operating expenses, legal expenses, reasonable attorneys' fees, alteration costs, and expenses of preparation for such reletting.

Prime Leases § 24.4 (emphasis added). This section further provides that the tenant's obligation following termination to pay rental deficiencies accrues "as the same shall arise." *Id.*

In addition section 24.4 contains the following liquidated "final" damages clause:

> At any time after such expiration or termination, whether or not Landlord shall have collected any monthly deficiencies as aforesaid. *Landlord shall be entitled to recover from tenant, and tenant shall pay to Landlord on demand, as and for liquidated and agreed final damages for tenants default, an amount equal to the excess of the annual rent reserved under this lease from the date of such expiration or termination for what would be the then unexpired term of this lease if the same had remained in effect, over the then fair rental value of the demised premises for the same period.*

Id. (emphasis added).

When it received what it considered to be an incomplete payment from RTC for the April rent, Cedarminn determined that RTC was in default under the leases, and invoked the above so-called "liquidated final damages" clause found in section 24.4 to demand immediate payment of all rent due over the balance of the lease terms, less the fair rental value of the premises multiplied by the remaining lease terms, which amount Cedarminn calculated to be in excess of $80 million.[4]

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4. The remaining terms in the Cedar and Metro Branch leases were 330 months. For the outstate, Midway and Robbinsdale leases, the remaining terms were 339 months. Zamansky Aff. Exh. B.

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After obtaining assignment of Chemical Bank's letter of credit and drawing both its letter of credit and the Chemical Bank letter of credit down to zero, Cedarminn then paid to Chemical Bank $1,273,414.06 in payment of a promissory note executed by Cedarminn in favor of Chemical Bank, and invested the balance in certain money accounts.[5]

Upon learning of Cedarminn's draws on the letters of credit, RTC moved the Court for injunctive relief pursuant to Federal Rule of Civil Procedure 62(c) to preserve the status quo. By order dated April 25, 1991, the Court found, pursuant to the factors set forth in *Dataphase Systems, Inc. v. C L Systems, Inc.*, 640 F.2d 109 (8th Cir. 1981), that preliminary injunctive relief was necessary to maintain the status quo to enable the Court to consider RTC's claim that Cedarminn's drafts against the letters were improper. In addition, the Court found that Cedarminn's drafts against the letters of credit without obtaining prior Court approval was in violation of the Court's previous order. Accordingly, after receiving full briefing and argument from both parties, the Court preliminarily enjoined Cedarminn from further disposing of the proceeds of the letters of credit until further order of the Court, and set on RTC's motion for expedited hearing.

The matter is now before the Court after additional briefing and argument on whether to continue the April 25, 1991 injunction while the appeal is pending.

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5. The present disposition of the funds are explained in a letter to the Court from Cedarminn counsel Weinstine dated April 24. 1991.

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DISCUSSION

I. *Whether the Court Has Jurisdiction to Entertain RTC's Motion*

Fed.R.Civ. P. 62(c) provides:

> *Injunction Pending Appeal.* When an appeal is taken from an interlocutory or final judgment granting . . . an injunction, the court in its discretion may . . . modify . . . [the] injunction during the pendency of the appeal upon such terms as to bond or otherwise as it considers proper for the security of the rights of the adverse party.

Fed.R.Civ.P. 62(c) has been interpreted to empower the Court to grant such reiief as may be necessary to "preserve the status quo with the least harm to the parties and the public pending appropriate review by the appellate court." *Cardiff Acquisitions, Inc. v. Hatch*, 597 F.Supp. 1493, 1501 (D.Minn.), *rev'd on other grounds*, 751 F.2d 917 (8th Cir. 1984). As noted by leading commentators on the Federal Rules, Rule 62(c):

> codifies the inherent power of courts to make whatever order is deemed necessary to preserve the status quo and to insure the effectiveness of the eventual judgment.

11 C.Wright & A.Miller, *Federal Practice and Procedure* § 2904 (1973). *See also Accident Fund v. Baerwaldt*, 579 F.Supp. 724, 725 (D.Mich. 1984) ("[Rule 62(c)] recognizes the power inherent in this court to preserve the status quo pending final resolution of this dispute where, in its sound discretion, the court concludes that the circumstances so justify it").

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The language in Rule 62(c) authorizing the district court to act in connection with injunctions "when an appeal is taken" has been construed to authorize such actions even after judgment has been entered in order to preserve the status quo while the case is pending in the appellate court. As the United States Court of Appeals for the Ninth Circuit held in *United States v. El-O-Pathic Pharmacy*, 192 F.2d 62, 79-80 (9th Cir. 1951) (per curiam):

> It is of course generally the rule that when an appeal is perfected the district court loses jurisdiction to take further action in the cause, but subdivision (c) of Rule 62 is an exception to the general rule and in recognition of the long established right of the trial court, after an appeal, to make orders appropriate to preserve the status quo while the case is pending in the appellate court . . . . Subdivision (c) of Rule 62, omits reference to any specific time when the district court may grant such an injunction, and we think that under common principles of construction, this authority in the district courts must now be held to continue throughout the period when the appeal is pending.

In *Newton v. Consolidated Gas Co. of New York*, 258 U.S. 165 (1922), cited by the court in *El-O-Pathic Pharmacy*, the Supreme Court considered an appeal from a district court order finding certain utility rates confiscatory. An amended order enjoined enforcement of the rates on the condition that plaintiff's charges not exceed $1.20 per thousand cubic feet until new rates were promulgated. The district court also required the utility to impound or adequately secure collections above eighty cents per thousand cubic feet pending establishment of new rates. An appeal was then filed but while the appeal was pending the district court

modified the injunction by directing that the excess between eighty cents and $1.20 per thousand feet should be impounded until three months after the determination of the appeal or until a new rate was fixed.

The Court reversed the district court's orders, finding that the court engaged in impermissible rate making by subjecting the utility company for an indefinite period to an unknown rate. However, the Court found that the district court's post-appeal order was not improper:

> The amendatory decree of February was obtained long after appeals from the August decree had been granted and when the court had very limited power over the litigation. "Our general rule in all cases (subject, however to some qualifications) is that an appeal suspends the power of the court below to proceed further in the cause." Undoubtedly, after appeal, the trial court may, if the purpose of justice require, preserve the status quo until decision by the appellate court. . . . but it may not finally adjudicate substantial rights directly involved in the appeal. . . . *The precise result of the February decree is somewhat doubtful, but we may treat it as an attempt to preserve the status quo in order that this court might finally and completely dispose of the whole matter.* Thus interpreted the decree was within the court's discretion . . .

Id. at 177-78.

Newton was recently followed in *Hawaii Housing Authority*

v. Midkiff, 463 U.S. 1323, 1324 (1983), wherein Justice Rehnquist, as circuit justice for the Ninth Circuit, denied a petition to stay or vacate an order of the court of appeals enjoining initiation of state administrative or judicial condemnation proceedings after the court of appeals found a state law unconstitutional under the fifth amendment taking clause. Four months after its opinion on the merits was issued, the court of appeals recalled its mandate for clarification and, pending clarification, issued the injunction enjoining the administrative or judicial proceedings.

Justice Rehnquist rejected petitioner's argument that the court of appeals lacked power to issue the injunction after a notice of appeal to the Supreme Court was filed. Petitioners argued that jurisdiction over the case at that time "shifted" to the Supreme Court. Justice Rehnquist found this reasoning "unpersuasive":

> Whatever the current application of the so-called jurisdictional shift theory to modern appellate procedure, it is well settled that a court retains the power to grant injunctive relief to a party to preserve the status quo during the pendency of an appeal, even to this Court. *See, e.g., Newton v. Consolidated Gas Co.*, 258 U.S. 169, 177 (1922); *Merimack River Savings Bank v. Clay Center*, 219 U.S. 527, 531-35 (1911); Fed.R.Civ.P. 62.

See also 11 C.Wright & A.Miller, *Federal Practice and Procedure* § 2904, at 324.

As the court held in *Maryann Pensiero, Inc. v. Lingle*, 847 F.2d 90, 97 (3d Cir. 1988), the rule that the filing of a notice of appeal divests the district court of jurisdiction pending disposition of the appeal is:

> a judge made, rather than a statutory, creation that is founded on prudential considerations. It is designed to prevent the confusion and inefficiency that would result if the district court and the court of appeals were adjudicating the same issues simultaneously. As a prudential doctrine, the rule should not be applied when to do so would defeat its purpose of achieving judicial economy.

See also Ayuda, Inc. v. Thornburgh, 919 F.2d 153, 156 (D.C.Cir. 1990) (Wald, C.J., concurring in part and dissenting in part), *vacated on other grounds*, 111 S.Ct. 1068 (1991) (*quoting Lingle* with approval).

Cedarminn argues that for the Court to take any further action with respect to the letters of credit would necessarily mean going beyond preservation of the status quo to adjudicate new rights and claims of the parties on the merits. The Court disagrees. Both the complaints of RTC and of Cedarminn in these actions sought declaratory relief concerning both Cedarminn's entitlement to draw against the letters of credit, and the enforceability of the leases which RTC sought to repudiate under FIRREA. The Court in its previous order ruling on the parties' motions for summary judgment found that RTC had not properly repudiated the leases but restrained Cedarminn from drawing on the letters of credit based on a claim that RTC's attempted repudiation was an event of default, so long as RTC continued to make all required lease payments and was not otherwise in default. Clearly, the Court has jurisdiction under Rule 62(c) to consider whether an injunction enjoining further disposition of the letters of credit is necessary to preserve the status quo pending appeal. When the March 4 order was issued, it appeared that the only issue was whether RTC's

attempted repudiation was, *per se*, an event of default entitling Cedarminn to draw against the letters of credit. It now appears, however, that Cedarminn claims that RTC is required to make full lease payments notwithstanding Cedarminn's receipt of rentals from the occupants. In order to preserve the status quo it appears necessary to consider Cedarminn's claim that it is entitled to the proceeds of the letters of credit as liquidated damages for RTC's partial rent payment on April 17, 1991. Resolution of this issue is necessary to maintain the status quo, *i.e.*, the integrity of the letters of credit, while RTC's appeal on the repudiation issue is pending. Contrary to Cedarminn's argument, it would not be the Court which would alter the status quo by enjoining further disposition of the letters of credit. Rather, it was Cedarminn which has attempted to significantly alter the status quo by declaring RTC in default and then terminating the leases and accelerating thirty years of rental payments. Pursuant to Fed.R.Civ.P. 62(c) the Court clearly has jurisidiction to consider RTC's claim that Cedarminn's termination and acceleration were wrongful and did not justify Cedarminn in drawing against the letters of credit.

II. Whether RTC is in Default Under the Leases

Cedarminn agrees that it is not entitled to "double" rental payment under both the prime leases and the new leases, noting that it offered in correspondence dated April 11, 1991 to put the rentals received from the new leases in separate accounts pending agreement with RTC concerning assignment of and indemnification for liability under the new leases. Indeed, Cedarminn counsel Zamansky states in his affidavit that Cedarminn initially wanted RTC to execute the leases with the occupants with RTC as sublessor. Clearly, in such a situation, RTC would be the first recipient of the occupants' rentals. Rather, Cedarminn argues that the setoff was itself an event of default

entitling Cedarminn to terminate the prime leases and accelerate rents over the balance of the prime lease term. In addition, Cedarminn apparently claims that RTC is not entitled to "credit" for the rentals received from the occupants under the new leases until it "consents" to those leases and accepts assignment as landlord/sublessor.

In response, RTC argues that its "setoff," even if wrongful under the prime lease, was nothing but a technical violation resulting in no out-of-pocket loss to Cedarminn. In relation to the "consent" issue, RTC contends that this argument is nothing but a "red herring," in that it obscures the fact that Cedarminn has in fact received full payment of all rent due under the prime lease, and can therefore claim no actual current damages.

On the issue of "consent," the Court agrees with RTC. The Court recognizes that the triangular relationship between RTC, Cedarminn and the occupants is not resolved, and the parties have yet to agree on their respective liabilities in relation to the occupants. However, there is no evidence that Cedarminn is at present receiving anything but full rent for the premises, through the combined performance of the occupants and RTC. Clearly, even if RTC has not formally "consented" to the precise terms of all of the new leases, and agreed with Cedarminn on all of the liability issues in relation to the occupants, it has acquiesced to the current arrangements at least with respect to its current rent obligations. For the sake of the current occupants, it is imperative that RTC and Cedarminn negotiate in good faith and reach accord on who shall bear the responsibililty for managing these properties as landlord. However, the Court need not resolve that relationship in order to determine that at present Cedarminn is receiving full rents due under the prime lease.

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On the other hand, the Court agrees with Cedarminn that RTC's partial payment on April 17, 1991 was a technical "default" under the prime lease. Section 4.2 of the leases provides that "the annual rent shall be paid without notice or demand, and without abatement, deduction or setoff . . . ." In addition, section 4.4 provides that "no abatement, diminution or deduction of rent, charges or other compensation shall be claimed by or allowed to tenant or any persons claiming under it, under any circumstances . . . ." This conclusion, however, does not resolve the present dispute. Even though the Court agrees that the April 17, 1991 setoff was an "event of default," the next question is what remedial rights Cedarminn was entitled to exercise as a result of RTC's default.[6]

A. Whether Cedarminn Was Entitled to Draw Against the Letters of Credit

RTC argues that even if the April 17, 1991 setoff was an "event of default," Cedarminn was not entitled to draw under the letters of credit because Cedarminn suffered no damages by reason of the default. RTC relies upon the following language in the security provisions in the leases governing the letters of credit:

> Such letters of credit shall be fully assignable and shall be payable against sight draft *in the amount*

6. RTC's claim that the occupants are "successors" under the prime leases and that there was therefore no "setoff" is without merit. It is undisputed that the present leases between Cedarminn and the occupants are "new" leases, and that the occupants have not assumed the terms of the prime leases with Midwest Federal. Thus, there is no basis for RTC's claim that the present occupants succeeded to the rights and obligations under the prime leases.

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> *necessary to reimburse Landlord for the cure of any default hereunder* or for damages to which Landlord is entitled.

Cedarminn Complaint Exh. D, Section 43 (emphasis added).

RTC argues that this provision entitles Cedarminn only to draw on the letters of credit to the extent necessary to "cure any default" under the prime leases, and that since Cedarminn received full rent no draw is necessary to "cure" RTC's default. Cedarminn admits that it is not entitled to double payment of the rent under both the prime leases and the new leases, and does not argue that the April 17, 1991 prime lease payment, together with the new lease rentals, left a rental "deficiency." Thus it appears that there are no *current* rental deficiencies as a result of RTC's improper setoff. Rather, Cedarminn accurately notes that the language stated above provides for drafts against the letters of credit not only to cure "defaults," but for "damages to which Landlord is entitled," and it is this language upon which Cedarminn relies for its right to draw against the letters of credit. According to Cedarminn, when RTC defaulted on its April 17 payment, Cedarminn was entitled under the prime leases to terminate the leases, to invoke the "liquidated *final* damages" provision quoted above, and to draw against the letters of credit as partial compensation for the "liquidated *final* damages" determined according to the formula set forth in that provision. In other words, Cedarminn's drafts against the letters of credit were "for damages to which Landlord is entitled," not strictly to "cure" RTC's "default" in the April 17 payment.

The Court finds that Cedarminn is partly correct on this point. RTC's argument ignores the language in the security provisions of the prime leases entitling Cedarminn to draw against the letters

of credit "for *damages* to which Landlord is entitled." This language can only mean that the prime leases purport to give Cedarminn the right to draw against the letters of credit to compensate itself for "damages," not strictly to cure defaults accruing as a result of rental deficiencies. However, for the reasons stated below, the Court finds that the "liquidated final damages" provision by which Cedarminn claims entitlement to terminate the prime leases and accelerate the rentals due over the balance of the lease term without regard to Cedarminn's actual damages is invalid under Minnesota law as a "penalty" provision.

B. Whether Section 24.4. of the Building Leases is Unenforceable as a "Penalty" Provision

As noted above, section 24.4 of the prime leases (and section 29.4 of the Cedar Street lease) purports to give Cedarminn the right to declare the leases terminated upon the occurrence of specified "events of default," and upon termination to require RTC to pay not only rent under the prime leases up to the date of termination, but rent for the balance of the leases, in this case 330 months, *offset by the present fair market rental value* of the leases multiplied by the same number of months. This formula, by definition, assumes that the rent due Cedarminn under the prime leases exceeds the "fair market value" of the rental properties, and, indeed, in this case, Cedarminn calculates the difference between the rents called for by the prime leases and the actual fair market rentals for the same period of time to be in excess of $80 million over the term of the leases. Cedarminn claims entitlement to such damages as a result of RTC's wrongful setoff even though the premises are presently occupied and generating rental income for Cedarminn.

In order to determine whether a contractual provision is one

for liquidated damages rather than an unenforceable penalty clause, the Court must determine:

> (1) if the fixed amount is a reasonable forecast of just compensation for the harm caused by the breach; and
>
> (2) if the harm is incapable or very difficult of accurate estimation.

Gorco Construction Co. v. Stein, 99 N.W.2d 69, 74-75 (Minn. 1959); *Bellboy Seafood Corp. v. Nathanson,* 410 N.W.2d 349, 352 (Minn.Ct.App. 1987). In determining whether a "liquidated damages" clause is valid, the Court considers language of the contract itself in light of the facts and circumstances under which it was made. In order to determine whether the clause fixes damages which are reasonable, the Court examines the contract as a whole, the nature of the damages contemplated, and the surrounding circumstances. *Gorco,* 99 N.W.2d at 74; *EDS Construction Co. v. North End Health Center, Inc.,* 412 N.W. 2d 783, 786 (Minn.Ct.App. 1987). In determining the issue, neither the intention of the parties nor their expression of intention is the governing factor. *Gorco,* 99 N.W.2d at 74. As the court held in *Gorco:*

> [P]unishment of a promisor for breach, without regard to the extent of the harm he has caused, is an unjust and unnecessary remedy, and a provision having an impact that is punitive rather than compensatory will not be enforced.

Gorco, 99 N.W.2d at 74. The Minnesota rule is consistent with

the Restatement of Contracts § 339.[7]

In this case, Cedarminn claims as "liquidated damages" that it is entitled to immediate payment from RTC in an amount in excess of $80 million to compensate it for RTC's default on April 17, 1991. Even though it appears that the premises subject to the lease are presently occupied and are presently generating rentals, Cedarminn contends that it is entitled to the immediate payment of $80 million to compensate it for the damages caused by RTC's default. Cedarminn's only argument in support of the reasonableness of the "liquidated final damages" provision addresses whether the provision formula should have discounted the lump sum payment to present value and applied an inflation index factor. *See* Affidavit of Ronald A. Zamansky. Cedarminn argues that its damages exceed the value of the letters of credit, even using assumptions that are most favorable to RTC. These calculations, however, assume the reasonableness of the prime lease rent in the first instance. The very fact that Cedarminn calculates the difference between the prime lease rent and the fair market value to be $80 million over the term of the lease illustrates the patent unreasonableness of the prime lease rent. At present, it appears that the prime lease rent is more than *five times* that of the premises' fair market value, as evidenced by the rents negotiated with the present occupants.

Under such circumstances, the Court cannot, in good conscience, enforce such a grossly exaggerated rent over the balance of a thirty-year lease. By definition, the liquidated final

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7. It is significant that FIRREA expressly provides that when the RTC does successfully repudiate a lease, "penalty" provisions are unenforceable, and the lessor may not receive punitive or exemplary damages or damages for lost profits or opportunity. 12 U.S.C. §§ 1821(e)(3)(B); 4(B)(ii).

damages formula overcompensates Cedarminn and unfairly penalizes RTC, by requiring RTC to pay in excess of the fair market rentals for the balance of the lease term. Further, this formula presumes that the "damages" to be paid will exceed the fair market value of the property. While Cedarminn has sought to persuade the Court that the sale/leaseback transactions were negotiated at "arm's length," *see* Affidavit of Newton Mandel, Cedarminn's counsel, Mr. Weinstine, recognizes that the lease arrangements were commercially unreasonable. In response to RTC's argument that the occupants are "successors" under the prime leases, Weinstine, on behalf of Cedarminn, made the following comment:

> The ridiculousness of this argument I think can most apt be summarized by pointing out the following: Your Honor probably recalls that in the spring of 1990, the RTC first attempted to sell Midwest as a whole, so that it would have its entire franchise value.
>
> Your Honor will also recall the evidence was that one of the reasons they weren't successful is no one wanted to assume these leases. Are we to believe today, if we accept the RTC position that these are successors, that these people represented by the likes of Briggs & Morgan, and Best & Flanagan, the Carl Pohlads of this community, essentially have agreed to honor a $4.2 million obligation per year of rentals? Because that's what a successor is.
>
> Of course they didn't.

May 6, 1991 Tr. at 45. As noted above, the Court agrees that

the present occupants are not "successors" to RTC's obligations under the prime leases, but also agrees that the "Carl Pohlads" of this community would never have agreed to the terms of these leases because the rentals bear no reasonable relationship to actual market conditions.

Further, the Court is required to take into consideration the circumstances under which the contract was negotiated in determining whether the "liquidated damages" clause is enforceable. Here, there is good reason to believe that the sale/leaseback transactions which are the subject of these lawsuits were intended solely to generate short-term substantial earnings and to elevate Midwest Federal's required capital. *See* Affidavit of Craig Nulliner, ¶ 6. According to Craig Nulliner, now assistant director of the Minneapolis consolidated office of the Resolution Trust Corporation, and formerly specialist in charge of Midwest Savings Association, Midwest Federal's successor in interest, Midwest Federal agreed to lease the branches at rental rates substantially higher than those of comparable rentals in the community in order to provide a source of income to Cedarminn to pay the mortgages, the proceeds of which would be used to allow Midwest Federal to record significant short term earnings, and thereby appease government regulators. Nulliner Aff. at ¶ 6. It appears to the Court that Midwest Federal's interest in negotiating the leases with Cedarminn was short term and the product of a desperate desire to keep a sinking ship afloat. The sale/leaseback transactions as a whole clearly reflect the parties' utter indifference to the financial soundness of the arrangement and the long-term interests of the bank's depositors, shareholders and government insurers. The Court finds that these factors, coupled with the obvious disproportionality of the "liquidated final damages" clause upon which Cedarminn attempts to rely, compels the conclusion that section 24.4 of the prime leases is

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a penalty provision rather than a liquidated damages provision and is not enforceable.

III. Whether the Court Should Enjoin Further Disposition of the Proceeds of the Letters of Credit

In the Court's preliminary injunction issued April 25, 1991, the Court applied the factors set forth in *Dataphase Systems, Inc. v. C L Systems, Inc.*, 640 F.2d 109 (8th Cir. 1981). The Court enjoined Cedarminn from further disposing of the proceeds of the letters of credit "in any manner or for any purpose whatsoever until further order of this Court."

It is now necessary to consider how the *Dataphase* factors apply in determining whether injunctive relief should issue pending appeal. Under *Dataphase*, in determining whether *preliminary* injunctive relief should issue, the question, "at base . . . is whether the balance of equities so favors the movant that justice requires the court to intervene to preserve the status quo until the merits are determined." 640 F.2d at 113. Four factors are weighed:

> (1) the treat of irreparable harm to the movant;
>
> (2) the state of balance between this harm and the injury that granting the injunction will inflict on other parties litigant;
>
> (3) the probability that movant will succeed on the merits; and
>
> (4) the public interest.
>
> *Dataphase*, 640 F.2d at 114.

Appendix F

A. Likelihood of Success on the Merits

Cedarminn argues that injunctive relief under these circumstances cannot comport with the *Dataphase* factors because the Court has already ruled against RTC on the issue before the Eighth Circuit, *i.e.*, whether RTC's repudiation of the leases was time barred under FIRREA. The Court disagrees. While the Court found that RTC violated FIRREA's requirement that the repudiation decision be made "within a reasonable time" following appointment of the RTC as conservator or receiver, in making that determination the Court construed a new statute addressing a complex national crisis with little guidance from the legislative history on the precise provision before the Court. Where an injunction is requested to preserve the status quo pending an appeal, and the requested relief is contrary to the district court's finding in the first instance, it is not necessary to show a likelihood of success on the merits, but rather merely a "substantial possibility" of such success. *Hayes v. City University of New York*, 503 F.Supp. 946, 962 (S.D.N.Y. 1981). In *Hayes*, the court held that in determining the "likelihood of success" factor in connection with a post-judgment motion for injunctive relief pending appeal, the Court should consider external, preferably objective indicia of the accuracy of its judgment, including (1) the extent to which the challenged decision is supported by precedent; (2) the standard of review that will govern the appeal; and (3) the extent to which the decision is supported or opposed by government agencies to whose judgment the appellate court would normally defer. These factors support issuance of injunctive relief in this case. As noted, the issue of repudiation is practically without precedent, the Court's March 4 decision will be reviewed de novo as an issue of law, and the Court's decision is opposed by the RTC in this instance, a government agency whose expertise in interpreting FIRREA is entitled to some deference. *See also*

Appendix F

Fundicao Tupy, S.A. v. United States, 671 F.Supp. 27 (Ct. Cl. 1987) ("with regard to injunctions pending appeal, where plaintiffs have raised questions which are serious, substantial, difficult, and doubtful, they need not show that there is a probability of success on the merits"); *Chang v. University of Rhode Island*, 107 F.R.D. 343, 344 (D.R.I. 1985) (granting stay concerning remedial phase of class action litigation pending appeal on liability issues, where issues raised "difficult and pivotal questions," and where there was a "dearth of controlling precedent and appreciable room for differences of opinion"). In light of the serious and doubtful issues presently pending before the court of appeals in this case and the dearth of controlling precedent, the Court finds that RTC is not so unlikely to succeed on the merits of their appeal on the repudiation issue as to preclude injunctive relief to maintain the status quo until that appeal can be decided.

B. Irreparable Harm

RTC argues that because Cedarminn is comprised of a number of single-purpose partnerships, it is highly likely that the proceeds of the letters of credit will be dissipated thereby mooting any chance that RTC would be able to recover such funds should RTC's position on repudiation be vindicated on appeal. Cedarminn argues that RTC has made no showing that the partnerships are insolvent or that the funds are actually in danger of imminent and irreplaceable dissipation. Cedarminn argues that the mere fact that Cedarminn is comprised of single-purpose partnerships is an insufficient basis upon which to find irreparable harm.

It is not necessary, however, to determine whether Cedarminn has sufficient assets to restore RTC to the *status quo ante* should RTC prevail on appeal. Under FIRREA, RTC is not required to show irreparable harm when seeking injunctive relief. *See* 12

U.S.C. § 1821(d)(18), (19). Further, numerous courts have held that where injunctive relief is necessary to effectuate congressional aims and purposes, the balance of hardships equation is not controlling. *See, e.g., Securities Industry v. Board of Governors of Federal Reserve System*, 628 F.Supp. 1438, 1443 (D.D.C. 1986). At issue in this case is the applicability of a new and complex statutory scheme to an urgent social problem of immense proportion. By enacting FIRREA, Congress has established a comprehensive statutory scheme governing the rights and obligations of the RTC in its capacity as receiver of failed financial institutions. In FIRREA, Congress has clearly expressed its intention that when seeking injunctive relief the RTC is not required to show immediate or irreparable harm. 12 U.S.C. § 1821(d)(18), (19). This provision is consistent with the judiciary's recognition that the traditional equitable factors are not controlling where important congressional aims and purposes are at issue. Accordingly, the Court finds that injunctive should issue without regard to the requirement that RTC show immediate and irreparable harm.

C. Balance of Harms

While the Court finds that RTC need not show that it will suffer irreparable harm should the injunction be denied, it is also noteworthy that it does not appear that Cedarminn will suffer significant harm should the requested injunctive relief be granted. As the foregoing discussion shows, it does not appear that Cedarminn has incurred any actual current damage, but rather is receiving rentals at the full prime lease rate. The Court having found that the "liquidated final damages" provision is an unenforceable penalty, control over the proceeds of the $11.8 million letters of credit would yield Cedarminn a significant windfall. Thus, even considering the balance of harms on both

sides, the Court finds that the balance weighs in favor of granting the requested injunctive relief.

D. Public Interest

As mentioned above in connection with irreparable harm, at issue in this case is a significant sum of money which RTC claims should be available to pay the creditors of a failed federally-insured financial institution. Moreover, Congress has enacted a comprehensive statutory scheme for resolving disputes arising out of the present "banking crisis." The issues before this Court, and before the court of appeals, are a classic case study in that crisis. In such a situation, the public's interest is in maintaining the status quo so that the statutory scheme may be applied as Congress intended.

In summary, the Court finds that because Cedarminn has not shown that it has suffered actual current damages as a result of RTC's setoff, and because the liquidated final damages provision is an unenforceable penalty clause, Cedarminn had no right to draw against the letters of credit, and injunctive relief is necessary to preserve the status quo pending appeal.

CONCLUSION

Based upon the foregoing, and upon all the files, records and proceedings in this case,

IT IS ORDERED that:

1. the injunction granted by the Court's previous order in this case dated March 4, 1991, is hereby modified as follows pursuant to Fed.R.Civ.P. 62(c);

Appendix F

2. until further order of this Court or the court of appeals, Cedarminn shall not in any way further dispose of the proceeds of letters of credit numbers 2150-N90100201 and 2150-N90083001 in any manner or for any purpose whatsoever.[8]

s/ Harry H. MacLaughlin
Judge Harry H. MacLaughlin
United States District Court

DATED: May 22, 1991

8. See footnote 5 regarding present location of these funds.

APPENDIX G — STATEMENT OF POLICY REGARDING TREATMENT OF COLLATERALIZED LETTERS OF CREDIT AFTER APPOINTMENT OF THE RESOLUTION TRUST CORPORATION AS CONSERVATOR OR RECEIVER DATED SEPTEMBER 25, 1990

9/25/90

STATEMENT OF POLICY REGARDING TREATMENT OF COLLATERALIZED LETTERS OF CREDIT AFTER APPOINTMENT OF THE RESOLUTION TRUST CORPORATION AS CONSERVATOR OR RECEIVER

Background

In April, 1990, the Board of Directors of the Resolution Trust Corporation (the "RTC") adopted a policy regarding the payment of interest on direct collateralized obligations of a savings association after appointment of the RTC as conservator or receiver of the association (the "Policy on Direct Obligations"). The Policy on Direct Obligations provides, among other things, that:

- The RTC, as conservator or receiver, has the right under the Financial Institutions Reform, Recovery, and Enforcement Act of 1989 ("FIRREA") to call, redeem or prepay any direct collateralized borrowing by repudiation or disaffirmance.

- Because of the market sensitive nature of the collateral generally securing these borrowings, such a redemption or prepayment through repudiation or disaffirmance will occur within 60 days after appointment of the conservator or receiver.

- In the event of such a redemption or prepayment, the principal amount of the obligation, plus interest at the contract rate up to and including the date of redemption or payment, will be payable to the extent secured by the collateral.

- If redemption or prepayment does not occur on or before the 60th day after the appointment of the conservator or receiver, then the terms of the contract will be enforceable during the pendency of the conservatorship or receivership.

The Policy on Direct Obligations defines the term "direct collateralized obligations" to exclude contingent obligations such as letters of credit. The press release issued by the RTC in connection with the Policy on Direct Obligations indicated that a separate policy statement dealing with letters of credit would be developed, and further indicated the expectation of the RTC staff that collateralized letters of credit issued prior to the effective date of FIRREA would be treated similarly to direct collateralized obligations. The press release also stated that the treatment of post-FIRREA letters of credit would remain under examination.

The Federal Deposit Insurance Corporation (the "FDIC") has maintained a longstanding position that letters of credit are not provable claims in a receivership unless the default by the account party that gives rise to the right to draw under the letter of credit has occurred prior to the appointment of the receiver. The FDIC also has taken the position that a security interest in collateral is enforceable only to the extent that the secured claim itself is enforceable. Accordingly, the security interest held by the beneficiary of a collateralized letter of credit is enforceable only to the extent that the letter of credit itself is a provable claim

(i.e., only if the default by the account party has occurred prior to the appointment of the receiver).

In contrast, the Federal Home Loan Bank Board (the "FHLBB"), prior to the enactment of FIRREA, provided written assurances to the credit rating agencies and others to the effect that the beneficiary of a collateralized letter of credit would have a provable claim and would have an enforceable security interest in the collateral even if the only event of default was the insolvency of the savings association. Under the FHLBB policy, the Federal Savings and Loan Insurance Corporation, as receiver of a failed savings association, could either accelerate the letter of credit and prepay the obligations supported by it using available cash or the proceeds of the sale of the collateral, or assume the association's obligations under the letter of credit arrangement, including any obligation to maintain and replenish the collateral to a specified market value.

Based on the assurances provided by the FHLBB, a large number of transactions were carried out making use of collateralized letters of credit issued by thrift institutions. One nationally recognized credit rating agency has estimated that such letters of credit presently support about $5.2 billion of rated obligations, and that about $840 million of that amount involves thrift institutions currently in conservatorship. In most cases, the letters of credit support tax-exempt obligations issued by state and local housing finance agencies or other public agencies, the proceeds of which were applied to provide financing for multi-family rental residential projects required to be occupied partially or wholly by persons and families of low- and moderation-income.

It should also be noted that in some of the transactions rated by the credit rating agencies, the letter of credit has been structured

as a "direct-pay" letter of credit rather than as a traditional standby letter of credit. The issuer of a direct-pay letter of credit must make payment on a regular, periodic basis, sometimes without the necessity of any prior notice or formal draw against the letter of credit, of an amount sufficient to pay the scheduled debt service on the secured obligation. The issuer obtains reimbursement of each such payment from the account party. A direct-pay letter of credit has many of the characteristics of a direct obligation and is difficult to characterize as a wholly contingent obligation.

Finally, it should be noted that many of the obligations secured by such letters of credit include provisions requiring periodic interest rate adjustment and remarketing. In some of these cases, the original letter of credit continues to secure the obligations following the rate adjustment and remarketing but in other cases, a renewal or extenstion of the letter of credit is required. Due to market and rating agency uncertainty regarding the RTC's position with respect to collateralized letters of credit, obligations of this type can be remarketed at the present time only at yields equivalent to non-investment grade securities. The higher interest costs are borne ultimately by the owners of the residential rental projects financed with the proceeds of the obligations, many of which are already facing financial difficulties.

Statement of Policy

The RTC has considered a number of relevant policy factors, including its legal rights and powers under FIRREA; the assurances provided by the FHLBB prior to the enactment of FIRREA and market reliance on those assurances; the need for market certainty and stability; the potential long-term cost to the RTC of outright repudiation of collateralized letters of credit or of immediate

redemption or prepayment of obligations secured by collateralized letters of credit; and the potential adverse impact of outright repudiation or immediate redemption or prepayment on residential rental projects that provide housing for persons and families of low-and-moderate-income. Based on its consideration and balancing of such factors, the RTC has determined to adopt and implement the following policy with respect to the treatment of collateralized letters of credit after appointment of the RTC as conservator or receiver:

(1) The Policy on Direct Obligations shall apply in all respects to collateralized letters of credit originally issued prior to the effective date of FIRREA. Accordingly, the RTC, in its capacity as conservator or reciever, may accelerate the letter of credit, in which event payment will be made on the letter of credit, to the extent of available collateral, up to an amount equal to the outstanding principal amount or accreted value of the secured obligations, together with interest at the contract rate up to (and including, if so provided in the contract) the date of payment, plus expenses of liquidation, if so provided in the contract. If the RTC does not accelerate the letter of credit, then the terms of the contract will be enforceable during the pendency of the conservatorship or receivership.

(2) The Policy on Direct Obligations shall apply in all respects to a collateralized letter of credit issued on or subsequent to the effective date of FIRREA only if the letter of credit was issued in renewal, replacement or extenstion of a letter of credit issued to support obligations issued prior to the effective date of FIRREA.

(3) Notwithstanding paragraph 3 of the Policy on Direct Obligations, the RTC shall have 180 (rather than 60) days from

the date of appointment of the conservator or receiver to make a determination whether or not to accelerate a collateralized letter of credit. The additional time is required to enable the RTC to properly evaluate a large number of comparatively small but highly complex transactions. In the case of institutions where the RTC already has been so appointed, the 180-day period shall begin to run as of the date of adoption of this policy.

(4) This policy is intended to cover only collateralized letters of credit utilized in capital markets financing transactions, including transactions involving publicly-offered obligations rated by one or more nationally-recognized credit rating agencies and transactions involving non-rated privately placed obligations structured in a manner substantially similar to such rated obligations in reliance upon assurances provided to the rating agencies by the FHLBB. It does not apply to trade or other letters of credit for other purposes.

(5) It is understood that persons involved in secured transactions with savings associations may reasonably rely upon this policy statement in entering into such transactions.

Appendix G

STATEMENT OF POLICY REGARDING THE PAYMENT OF INTEREST ON DIRECT COLLATERALIZED OBLIGATIONS AFTER APPOINTMENT OF THE RESOLUTION TRUST CORPORATION AS CONSERVATOR OR RECEIVER

Pursuant to 12 U.S.C. § 1441a(b)(4) and 12 U.S.C. § 1821(e)(1), the Resolution Trust Corporation ("RTC") when acting as conservator or receiver of a savings association has the power to disaffirm or repudiate any contract or lease (i) to which the savings association is a party; (ii) the performance of which the conservator or receiver, in the conservator's or receiver's discretion, determines to be burdensome; and (iii) the disaffirmance or repudiation of which the conservator or receiver determines, in the conservator's or receiver's discretion, will promote the orderly administration of the savings association's affairs. This repudiation or disaffirmance must be done within a reasonable time after the appointment of the conservator or receiver. 12 U.S.C. § 1821(e)(2). Damages for contracts other than "qualified financial contracts" as defined in the Federal Deposit Insurance Act ("FDIA") are limited to actual, direct, compensatory damages determined as of the date of the appointment of the conservator or receiver. 12 U.S.C. § 1821(e)(3)(A). Such damages do not include, among other things, lost opportunity. 12 U.S.C. § 1821(e)(3)(B). With regard to secured contracts, the FDIA provides that the repudiation provisions are not to be construed as permitting the avoidance of any legally enforceable or perfected security interest in any assets of the savings association except where such interest is taken in contemplation of the savings association's insolvency or with the intent to hinder, delay, or defraud the savings association or the savings association's creditors. 12 U.S.C. § 1821(e)(11). Absent this provision for legally enforceable or perfected security interests the conservator or receiver arguably could avoid such security interests and render

any claim on the repudiated contract unsecured. Reading these statutory provisions as a whole, it is clear that even secured contracts may be repudiated; that damages are limited to the extent set forth in the statute; and that legally enforceable or perfected security agreements are to be honored to the extent of such damages but no further or otherwise. In other words, if there is a repudiation, the collateral securing a contract may be liquidated and the proceeds paid to or retained by the creditor up to the damages allowed by the statute, i.e., damages for actual direct compensatory losses measured as of the date of the appointment of the conservator or receiver. The remaining collateral or proceeds must then be remitted or returned to the conservator or reciever as property of the savings association or its estate or to a bona fide junior lienholder to the extent applicable.

While this is the existing law and is applicable to all contracts which have been or will be repudiated by a conservator or receiver after August 9, 1989, regardless of when the contract was entered into, certain issues have been raised regarding: 1) the "reasonable period of time" for such repudiations; 2) the "unjust enrichment" of the conservatorship or receivership prior to redemption or payment; and 3) the treatment of contracts entered into prior to August 9, 1989, particularly in light of previous interpretations and/or statements by the Federal Home Loan Bank Board and the FDIC.

After due consideration of all the various competing interests including those of the secured and unsecured creditors of savings association conservatorships or receiverships, the need to provide certainty and stability in the financial markets and in order to avoid conditions or circumstances which might result in additional expense to the RTC in the long run, the following policy will be implemented regarding the payment of interest on direct

collateralized borrowings of a savings association after the appointment of the RTC as conservator or receiver:

1) For purposes of this policy, "direct collateralized borrowings" means direct, non-contingent obligations for borrowings made by the savings association prior to the appointment of a conservator or receiver but does not include extensions of credit from any Federal Reserve bank of Federal Home Loan bank pursuant to 12 U.S.C. 1821(e)(13)(A), or such contingent obligations as letters of credit to any insured depository institution. Letters of credit will be dealt with in a separate policy statement after further study. This Policy Statement should not be taken as an indication of how such contingent obligation contracts will be treated.

2) It is to be recognized that the conservator or receiver has the right to call, redeem or prepay any direct collateralized borrowings by repudiation or disaffirmance either directly by cash payment release of the collateral or by repudiation of the contract evidencing such borrowings followed by liquidation of the collateral by a trustee or other secured party.

3) Because of the market sensitive nature of the collateral generally securing these borrowings, repudiation or disaffirmance with respect to direct collateralized borrowings will occur within 60 days after appointment of the conservator or receiver.

4) Interest will be payable at the contract rate up to the date of the redemption or payment (including the day of payment or redemption, if provided by the contract) by the conservator, receiver or the or the trustee of an amount equal to the principal owed plus the contract rate of interest up to the date of such payment or redemption or the principal plus accreted interest or

value to the date of redemption or payment whichever the case may be (plus any expenses of liquidation if provided for by the contract), to the extent secured by the collateral.

5) If repudiation does not occur on or before the 60th day after the appointment of the conservator or receiver then the terms of the contract including the contract rate of interest will be enforceable during the pendency of the conservatorship or receivership.

6) If a receivership results in a purchase and assumption transaction with a newly chartered savings association or bridge bank (de novo institution) placed under RTC conservatorship (pass-through receivership) then upon final resolution i.e., the liquidation or sale of the de novo institution to a third party through a subsequent receivership, the subsequent receiver shall have the option to repudiate the contract under the same terms and conditions set out above even if honored by the prior conservator and/or receiver.

7) The RTC will vigorously enforce its rights against any trustee where the trustee fails to expeditiously in an orderly and commercial reasonable manner liquidate the collateral for such obligations. It is the RTC's intent that the collateral be liquidated in the most expeditious manner consistent with the orderly and efficient disposition of the collateral, taking into consideration the RTC's right to any excess and the preservation of the value of the collateral; the wasting of such excess being a direct detriment to the RTC for which it will seek recompense.

8) This policy is not intended to affect any rights relating to a bona fide default which is not otherwise avoidable by the conservator or receiver pursuant to the contract or applicable law,

with the understanding that the conservator or receiver is not subject to "prepayment penalties" of any kind regardless of the basis for any default. Further, it is the position of the RTC that any acceleration provisions which result in a payment greater than principal and accrued interest or accreted value to the day of the payment are not enforceable against a conservator or receiver.

9) This policy shall be effective for all savings associations for which the corporation has been or may be appointed conservator or receiver. For institutions where the Corporation has already been so appointed, the 60 day period set out in paragraph 3 above shall begin to run as of adaption of this policy.

10) It is understood that persons involved in secured transaction with savings association may reasonably rely upon this Policy Statement in entering into such transaction.

APPENDIX H — RELEVANT STATUTORY PROVISIONS

12 U.S.C. § 1821(e)(1) Authority to repudiate contracts

> In addition to any other rights a conservator or receiver may have, the conservator or receiver for any insured depository institution may disaffirm or repudiate any contract or lease —
>
> (A) to which such institution is a party;
>
> (B) the performance of which the conservator or receiver, in the conservator's or receiver's discretion, determines to be burdensome; and
>
> (C) the disaffirmance or repudiation of which the conservator or receiver determines, in the conservator's or receiver's discretion, will promote the orderly administration of the institution's affairs.

12 U.S.C. § 1821(e)(2) Timing of repudiation

> The conservator or receiver appointed for any insured depository institution in accordance with subsection (c) shall determine whether or not to exercise the rights of repudiation under this subsection within a reasonable period following such appointment.

12 U.S.C. § 1821(e)(3) Claims for damages for repudiation

> (A) In general.
>
> Except as otherwise provided in subparagraph (C) and paragraphs (4), (5), and (6), the liability of the conservator or receiver for the disaffirmance

or repudiation of any contract pursuant to paragraph (1) shall be —

(i) limited to actual direct compensatory damages; and

(ii) determined as of —

(I) the date of the appointment of the conservator or receiver; or

(II) in the case of any contract or agreement referred to in paragraph (8), the date of the disaffirmance or repudiation of such contract or agreement.

(B) No liability for other damages.

For purposes of subparagraph (A), the term "actual direct compensatory damages" does not include —

(i) punitive or exemplary damages;

(ii) damages for lost profits or opportunity; or

(iii) damages for pain and suffering.

12 U.S.C. § 1821(e)(4) Leases under which the institution is the lessee

(A) In general.

If the conservator or receiver disaffirms or

repudiates a lease under which the insured depository institution was the lessee, the conservator or receiver shall not be liable for any damages (other than damages determined pursuant to subparagraph (B)) for the disaffirmance or repudiation of such lease.

(B) Payments of rent.

Notwithstanding subparagraph (A), the lessor under a lease to which such subparagraph applies shall —

(i) be entitled to the contractual rent accruing before the later of the date —

(I) the notice of disaffirmance or repudiation is mailed; or

(II) the disaffirmance or repudiation becomes effective, unless the lessor is in default or breach of the terms of the lease;

(ii) have no claim for damages under any acceleration clause or other penalty provision in the lease; and

(iii) have a claim for any unpaid rent, subject to all appropriate offsets and defenses, due as of the date of the appointment which shall be paid in accordance with this subsection and subsection (k).

Appendix H

12 U.S.C. § 1821(e)(11) Certain security interests not avoidable

> No provision of this subsection shall be construed as permitting the avoidance of any legally enforceable or perfected security interest in any of the assets of any depository institution except where such an interest is taken in contemplation of the institution's insolvency or with the intent to hinder, delay, or defraud the institution or the creditors of such institution.

12 U.S.C. § 1821(e)(13) Exception for federal reserve and federal home loan banks

> No provision of this subsection shall apply with respect to —
>
> (A) any extension of credit from any Federal home loan bank or Federal Reserve bank to any insured depository institution; or
>
> (B) any security interest in the assets of the institution securing any such extension of credit.

Supreme Court, U.S.
FILED
AUG 26 1992
OFFICE OF THE CLERK

(2)

No. 91-2059

In the Supreme Court of the United States

OCTOBER TERM, 1992

CEDARMINN BUILDING LIMITED PARTNERSHIP, ET AL.,
PETITIONERS

v.

RESOLUTION TRUST CORPORATION, AS RECEIVER FOR
MIDWEST ASSOCIATION, F.A.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

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QUESTION PRESENTED

Section 1821(e) of Title 12 authorizes the "conservator or receiver appointed" for any insured depository institution to repudiate any lease "within a reasonable period following such appointment." The Resolution Trust Corporation (RTC) has interpreted Section 1821(e) to permit it to repudiate a lease within a reasonable period after it has been appointed the receiver of an institution, including in cases where the RTC has previously served as conservator of the same institution. The question presented is whether the RTC's interpretation reflects a permissible construction of Section 1821(e) under *Chevron U.S.A. Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984).

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12 U.S.C. 1821(e)(1) 3, 4, 11, 12
12 U.S.C. 1821(e)(2) 4, 6, 10, 11, 12, 14, 15
12 U.S.C. 1821(e)(4) 5, 18
12 U.S.C. 1821(e)(4)(B)(ii) 20
12 U.S.C. 1821(e)(11) 18, 19, 20, 21
12 U.S.C. 1821(e)(13) 18, 19, 21
12 U.S.C. 1441a(b)(12)(A) (Supp. II 1990) 18
12 U.S.C. 1441a(b)(12)(B) (Supp. II 1990) 18

Miscellaneous:

55 Fed. Reg. 14,368 (1990) 18

In the Supreme Court of the United States

OCTOBER TERM, 1992

No. 91-2059

CEDARMINN BUILDING LIMITED PARTNERSHIP, ET AL., PETITIONERS

v.

RESOLUTION TRUST CORPORATION, AS RECEIVER FOR MIDWEST ASSOCIATION, F.A.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 2a-25a) is reported at 956 F.2d 1446. The March 4, 1991, memorandum and order of the district court (Pet. App. 26a-60a), the April 25, 1991, order of the district court (Pet. App. 61a-67a), and the May 22, 1991, memorandum and order of the district court (Pet. App. 68a-98a) are unreported.

JURISDICTION

The judgment of the court of appeals was entered on February 18, 1992. A petition for rehearing was denied on March 27, 1992. Pet. App. 1a. The petition for a writ of certiorari was filed on June 23, 1992. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. In 1985 and 1986, Midwest Federal Savings and Loan Association (Midwest Federal) sold 19 of its branch offices to petitioners, a group of investment partnerships, and then leased them back.[1] Midwest Federal devised these sale/leaseback transactions as "a short-term solution to keep federal regulators at bay." Pet. App. 7a. Indeed, Midwest Federal reported significant income in the years that the sales were recognized, because it sold the branch offices at prices well above their market value. See *ibid*; see also *id.* at 28a.

The sale/leaseback transactions were nonetheless quite costly for Midwest Federal over the long haul. For one thing, the entire risk of the transactions fell on Midwest Federal. Midwest Federal wholly financed the sale by lending Cedarminn 100% of the purchase price on a non-recourse basis. Midwest Federal also obtained two letters of credit in favor of Cedarminn, totalling $11.8 million, to pay damages in the event Midwest Federal defaulted on its lease obligations. In addition, Midwest Federal agreed to rent the branch

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[1] Petitioners are Cedarminn Building Limited Partnership, Minncedar Land Limited Partnership, Rockminn Leasing Corporation, and Midunited Building Company. Hereafter we will refer to them collectively as "Cedarminn."

offices from Cedarminn at a rate five times greater than the market rate. Pet. App. 7a, 28a-29a.

In February 1989, the Federal Home Loan Bank Board (the Bank Board) declared Midwest Federal insolvent and appointed the Federal Savings and Loan Insurance Corporation (FSLIC) as conservator. In May 1989, the Bank Board appointed FSLIC as receiver of Midwest Federal for the purpose of liquidating the institution. To carry out the liquidation of Midwest Federal, the Bank Board created a new institution, Midwest Savings Association (Midwest Savings), and appointed FSLIC its conservator. Midwest Federal and Midwest Savings then entered into a purchase and assumption agreement, under which the majority of Midwest Federal's assets were transferred to Midwest Savings, in return for which Midwest Savings assumed certain liabilities of Midwest Federal.[2] As a result of this "pass-through receivership," FSLIC acquired the branch-office leases in its capacity as conservator of Midwest Savings. Pet. App. 29a.

When the Financial Institutions Reform, Recovery, and Enforcement Act of 1989 (FIRREA) was enacted on August 9, 1989, the Resolution Trust Corporation (RTC) statutorily succeeded FSLIC as conservator of Midwest Savings. Pet. App. 8a. FIRREA gave the conservator or receiver appointed for any insured institution the right to "repudiate any contract or lease," 12 U.S.C. 1821(e)(1) (Supp. II 1990), "within a reasonable period following such appoint-

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[2] Midwest Savings did not, however, assume any of Midwest Federal's subordinated debt or equity liabilities or obligations. As a result, FSLIC, as receiver for Midwest Federal, retained Midwest Federal's obligations with respect to the subordinated debt and the equity.

ment," 12 U.S.C. 1821(e)(2) (Supp. II 1990).[3] As the conservator of Midwest Savings, RTC decided that for two reasons it would not be in the institution's best interest to repudiate the branch-office leases at that point. First, RTC needed the offices to carry on the business. Second, RTC estimated that repudiation could cause Midwest Savings to lose as much as a third of its deposits and half of its customers. C.A. App. 566, 2035, 2752.

The inflated rent payments required under the leases nevertheless posed a serious obstacle to the sale of Midwest Savings as a going concern. Accordingly, RTC as conservator of Midwest Savings attempted between February 1989 and October 1990 to negotiate a modification of the leases with Cedarminn. During the negotiations, RTC as conservator occupied the leased premises, made all required lease payments,

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[3] 12 U.S.C. 1821(e)(1) (Supp. II 1990) provides:

> In addition to any other rights a conservator or receiver may have, the conservator or receiver for any insured depository institution may disaffirm or repudiate any contract or lease—
>
> (A) to which such institution is a party;
>
> (B) the performance of which the conservator or receiver, in the conservator's or receiver's discretion, determines to be burdensome; and
>
> (C) the disaffirmance or repudiation of which the conservator or receiver determines, in the conservator's or receiver's discretion, will promote the orderly administration of the institution's affairs.

12 U.S.C. 1821(e)(2) (Supp. II 1990) provides in pertinent part:

> The conservator or receiver appointed for any insured depository institution * * * shall determine whether or not to exercise the rights of repudiation under this subsection within a reasonable period following such appointment.

and retained the employees of Midwest Federal. Despite RTC's efforts, the negotiations to modify the leases ultimately proved fruitless. C.A. App. 2034, 2037, 2752.

Meanwhile, in May and June of 1990, RTC attempted to sell Midwest Savings as a whole, including the branches subject to the unmodified leases with Cedarminn. After receiving no acceptable bids for the institution as a whole, the institution was marketed in pieces. That approach produced acceptable bids for some assets and for the deposits in the branches subject to the leases with Cedarminn. C.A. App. 566, 2047, 2757.

On October 5, 1990, the Office of Thrift Supervision (OTS), statutory successor to the Bank Board, appointed RTC receiver for Midwest Savings to liquidate the institution. Upon its appointment as receiver, RTC transferred the insured deposits from the branches and sold the assets for which bids had been received. On October 29, 1990, RTC notified Cedarminn that it was repudiating the branch-office leases as of February 28, 1991. Along with the repudiation notice, the RTC tendered the rental payments due through February of 1991, as required by 12 U.S.C. 1821(e)(4) (Supp. II 1990). Pet. App. 8a, 9a & n.4.

2. RTC then brought an action against Cedarminn in the United States District Court for the District of Minnesota, seeking a declaratory judgment that its repudiation of the branch-office leases was timely and that Cedarminn had no right to draw against the letters of credit. Cedarminn filed a separate action, later consolidated with RTC's on appeal, seeking damages and a declaration that it could draw on the letters of credit. On cross-motions for summary

judgment, the district court held that RTC's repudiation was untimely, but that Cedarminn was not entitled to draw on the letters of credit. Pet. App. 8a.

The court's analysis of the repudiation issue focused on 12 U.S.C. 1821(e)(2) (Supp. II 1990), which requires "[t]he conservator or receiver appointed for any insured depository institution" to "determine whether or not to exercise the rights of repudiation * * * within a reasonable period following such appointment." RTC argued that in this case the "reasonable period" specified in Section 1821(e)(2) started on the date that RTC was appointed receiver of Midwest Savings—*i.e.*, October 5, 1990. Cedarminn argued, on the other hand, that the "reasonable period" started, at the latest, on August 9, 1989, the date that the RTC became conservator of Midwest Savings by operation of FIRREA. The court adopted Cedarminn's interpretation, stating "it appears that FIRREA requires the RTC to make the hard decision whether or not to repudiate before the decision is made to liquidate, *i.e.*, upon appointment of [RTC as] either a conservator *or* [as] a receiver." Pet. App. 44a. Based on that interpretation, the court determined that the 14-month period between August of 1989—when RTC became conservator of Midwest Savings—and October of 1990—when RTC, as receiver of Midwest Savings, repudiated the branch-office leases—was unreasonable, and that the repudiation was therefore invalid. *Id.* at 56a.

The court nonetheless rejected Cedarminn's argument that RTC's attempt to repudiate the leases "in and of itself, constitute[d] a default entitling Cedarminn to the proceeds of the letter of credit." Pet. App. 53a. Instead, the court held that "[i]f RTC

continues to make lease payments under the lease[s], Cedarminn can claim no default or entitlement to damages under the letter of credit." *Ibid.* The court enjoined Cedarminn from drawing on the letters of credit "so long as RTC continues to make all required lease payments * * * and is not in default." *Id.* at 57a.[4]

3. The court of appeals reversed. Pet. App. 2a-25a. It concluded that, under Section 1821(e), RTC had the right to repudiate the leases within a reasonable period after it was appointed receiver of Midwest Savings, even though it had not repudiated the leases while serving as conservator of that institution.

In arriving at that conclusion, the court first determined that the "plain language of FIRREA [12 U.S.C. 1821(e)] grants independent rights of repudiation to RTC in both its capacity as conservator and as receiver of an institution." Pet. App. 10a. The court observed that "[n]owhere in the language of the statute is it stated or implied that the appointment of RTC as a conservator negates powers RTC would enjoy if it were later appointed a receiver of the same institution." *Id.* at 11a. The court also reasoned that "[h]ad Congress intended RTC's status as a conservator or a receiver to be mere artifice, it would have granted all duties, rights, and powers to the Corporation." *Ibid.*

The court then turned to the question whether, "in situations where the receiver follows a conservator,"

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[4] Subsequently, Cedarminn did draw on the letters of credit. The Federal Home Loan Bank, which had issued the letters, honored the draw and foreclosed on the collateral for the letters. By orders dated April 25 and May 22, 1991, the district court enjoined Cedarminn from disposing of the proceeds. Pet. App. 68a-98a.

"Congress' mandate to make the repudiation determination within a reasonable period contemplate[d] only a single time frame" that commenced upon the appointment of a conservator, or an additional, "independent repudiation time frame" that commenced upon the appointment of the receiver. Pet. App. 12a. The court determined that with respect to that question the language of Section 1821(e) was "less than crystalline." *Id.* at 14a. The court observed, however, that "RTC has formally interpreted § 1821(e)" as allowing "both the conservator and the receiver to have an independent 'reasonable period' in which to repudiate." *Ibid.* The court held that that interpretation was "clearly a permissible construction" of Section 1821(e) under *Chevron U.S.A. Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984), Pet. App. 25a, and in fact reflected "the most reasonable interpretation" of that provision, Pet. App. 23a.

The court cited six reasons for that conclusion. First, throughout FIRREA Congress was careful to specify those powers that the RTC "could pursue only in its capacity as receiver, or only in its capacity as conservator, but not both." Pet. App. 16a. In light of those instances, other instances, such as in Section 1821(e), in which Congress authorized RTC to exercise a power as "a conservator or a receiver" indicated an intent to allow the power "to be enjoyed or exercised by both the conservator and the receiver." Pet. App. 16a. Second, Congress's use of the disjunctive term "or" in Section 1821(e) further evidenced congressional intent "to grant RTC an independent right of repudiation in both its capacity as conservator and receiver." Pet. App. 17a (citing *Reiter* v. *Sonotone*

Corp., 442 U.S. 330, 339 (1979)). Third, the legislative history of FIRREA "emphasize[d] that the powers granted RTC * * * parallel the powers granted conservators or receivers under the former law," which recognized that conservators and receivers had independent rights to repudiate contracts and leases. Pet. App. 17a-18a. Fourth, RTC's interpretation accorded with FIRREA provisions that made clear that conservators and receivers "have different missions." *Id.* at 19a. Fifth, when FIRREA was enacted, it "ha[d] long been recognized that conservators of failed institutions are often replaced by receivers." *Id.* at 21a. Finally, RTC's interpretation accorded with Congress's intent to "grant[] broad power to the Corporation," as well as Congress's specific intention that RTC "look closely at sale-leaseback transactions such as those at issue here." *Id.* at 22a.

Having concluded that "RTC retained a new power to repudiate leases when it was appointed receiver in October 1990," Pet. App. 23a, the court held that "RTC's repudiation within twenty-four days of its appointment as receiver was reasonable," *id.* at 24a. The court also held that, since "FIRREA ha[d] been fully complied with," Cedarminn's damages were "limited to those prescribed under 12 [U.S.C.] § 1821 (e)(4)." *Id.* at 25a.

ARGUMENT

The court of appeals properly reviewed RTC's interpretation of 12 U.S.C. 1821(e) under *Chevron*, *supra*, and correctly concluded that it reflected a permissible construction of the statute. The decision of the court of appeals does not conflict with any decision of this Court or any other court of appeals. Further review is therefore not warranted.

1. Petitioners assert (Pet. 11) that the questions presented here are "at the heart of the nation's savings and loan crisis." Petitioners' own submission demonstrates the error of that assertion. As petitioners observe (*id.* at 12), since its inception in 1989 RTC has served as a conservator or receiver of hundreds of failed thrifts and handled billions of dollars in assets. Yet the provision at issue here, 12 U.S.C. 1821(e)(2), has been the subject of only four other district court decisions.[5] Moreover, as discussed below, none of those decisions warranted a different result here. Thus, petitioners' invocation of the "savings and loan crisis" (Pet. 11) does not justify further review of the question presented here in the absence of any conflict among the circuits on that question. In any event, the court of appeals decided that question correctly.

2. The court of appeals held that, under 12 U.S.C. 1821(e)(2), RTC may repudiate a lease within a reasonable period after it has been appointed receiver

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[5] See *Hunt* v. *RTC*, No. CV-92-1560-JMI (C.D. Cal. July 13, 1992); *RTC* v. *United Trust Fund, Inc.*, 775 F. Supp. 1465 (S.D. Fla. 1991), appeal pending, No. 91-5922 (11th Cir.); *701 NPB Associates* v. *FDIC*, 779 F. Supp. 1336 (S.D. Fla. 1991); and *Monument Square Associates, Inc.* v. *RTC*, 792 F. Supp. 874 (D. Mass. 1991).

of an institution, even when RTC previously served as conservator of the institution and did not repudiate the lease. Petitioners challenge that holding on several grounds, none of which has merit.

a. Petitioners first contend (Pet. 14) that the court of appeals "ignore[d] the plain language of the statute." The pertinent language of Section 1821(e)(2) is as follows:

> The conservator or receiver appointed for any insured depository institution * * * shall determine whether or not to exercise the rights of repudiation under this subsection within a reasonable period following such appointment.

As the court of appeals noted, the use of the disjunctive term "or" indicates that the terms separated by the "or" should be given independent effect. Pet. App. 17a. RTC's interpretation does so. Under RTC's interpretation, the conservator and the receiver each has an independent power under Section 1821(e)(1) to repudiate a lease, and under Section 1821(e)(2) each may exercise that power within a reasonable period after being appointed. RTC's reading reflects, at a minimum, a reasonable construction of the language.

Petitioners' interpretation, in contrast, is not faithful to the language of the statute. Under petitioners' reading, a receiver has no power to repudiate a lease in certain cases: namely, in cases where a conversator has previously been appointed and has determined not to repudiate the lease. See Pet. 15. But the plain language of Section 1821(e)(1) grants the receiver an independent right to repudiate a lease in *all* cases, including those in which the conservator has previously decided not to repudiate the lease.

Nothing in Section 1821(e)(2) restricts the right granted to the receiver in Section 1821(e)(1). As the court of appeals observed, "[n]owhere in the statute is it stated or implied that the appointment of RTC as a conservator negates powers RTC would enjoy if it were later appointed a receiver of the same institution." Pet. App. 11a. Because petitioners' interpretation imposes a restriction on the repudiation power of a receiver that has no support in the language of the statute, the court of appeals correctly upheld RTC's interpretation as "the most reasonable" one. *Id.* at 23a.

b. Petitioners next contend (Pet. 15) that RTC should not have "the luxury" of waiting until after it has been appointed receiver to decide whether to repudiate a lease. They argue that RTC should be forced to make that decision once and for all as soon as it is appointed conservator.

As the court of appeals recognized, this argument ignores the "distinct missions of the conservator and receiver." Pet. App. 18a-19a. In its capacity as conservator of a failed thrift, the RTC must "carry on the business of the institution and preserve and conserve the assets and property of the institution." 12 U.S.C. 1821(d)(2)(D)(ii) (Supp. II 1990). As receiver, in contrast, RTC is empowered to liquidate the institution. 12 U.S.C. 1821(d)(2)(E) (Supp. II 1990).

In light of the differences between RTC's duties as a conservator and its duties as a receiver, RTC could reasonably decide not to repudiate a lease while it was serving as the conservator of an institution but decide otherwise after it was appointed receiver of the institution. As the court of appeals explained:

> A conservator needs an open door; a receiver does not. Therefore, the value of a specific lease

> could vary significantly depending on the mission of the occupying party at the particular time. The requirement that RTC make the repudiation decision once and for all shortly after its first appointment as conservator would put RTC in the untenable position of trying to operate the business as an ongoing concern with one hand, while at the same time calculating the lease repudiation issue as if it were shutting the business down.

Pet. App. 20a.[6]

c. Petitioners also contend (Pet. 16-17) that the court of appeals improperly ignored 12 U.S.C. 1821 (d)(14)(B) (Supp. II 1990). Section 1821(d)(14)(B) is a statute of limitations, however, not a sub-

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[6] Petitioners also assert (Pet. 16) that RTC could indefinitely postpone the repudiation decision by ignoring the statutory distinctions between its duties as conservator and receiver. That assertion is baseless insofar as it implies that RTC will disregard its statutory duties in future cases. See *United States Dep't of State* v. *Ray*, 112 S. Ct. 541, 550 (1991) (official conduct is accorded a presumption of regularity); accord *United States* v. *Chemical Found., Inc.*, 272 U.S. 1, 14-15 (1926). Insofar as petitioners contend that RTC unduly delayed repudiating the leases in this case, that fact-bound contention does not warrant further review. Although the court of appeals found it unnecessary to decide whether the fourteen-month period between RTC's appointment as conservator of Midwest Savings and its repudiation of the leases in its capacity as receiver was "unreasonable," the court noted that "since Cedarminn could show no prejudice by RTC's continued attempts to renegotiate the leases prior to the placement of Midwest Savings in receivership, RTC's repudiation could have been reasonable regardless of whether it had been appointed receiver of the institution and given an independent opportunity to repudiate the leases." Pet. App. 24a (footnote omitted).

stantive provision, and it was not at issue in this case.[7] Accordingly, there is no reason to believe that the court of appeals' interpretation of Section 1821 (e) (2) would necessarily lead it to adopt what petitioners consider an irrational interpretation of a different provision.

d. Petitioners criticize (Pet. 17) the court of appeals for discussing pre-FIRREA cases concerning the powers of conservators and receivers. That criticism is misguided. As the court of appeals explained, the legislative history of FIRREA indicated that Congress intended to grant to RTC powers that were "parallel" to those granted conservators and receivers under former law. Pet. App. 18a. Moreover, quite apart from such indicia of congressional intent, it was reasonable for the court to presume that Congress was aware of the traditional powers of conservators and receivers, and intended to confer those powers on RTC by directing it to act, in various contexts, as "conservator" or "receiver." See, e.g., *American National Red Cross* v. *S.G.*, 112 S. Ct. 2465, 2469 (1992). Thus, the court of appeals was properly guided by the case law extant when FIRREA was enacted.

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[7] 12 U.S.C. 1821 (d) (14) (A) (Supp. II 1990) generally prescribes, for "any action brought by the Corporation as conservator or receiver," a 6-year limitations period for contract claims and a 3-year period for tort claims. 12 U.S.C. 1821 (d) (14) (B) (Supp. II 1990) then provides:

> For purposes of subparagraph (A), the date on which the statute of limitation begins to run on any claim described in such subparagraph shall be the later of—
>
> (i) the date of the appointment of the Corporation as conservator or receiver; or
>
> (ii) the date on which the cause of action accrues.

e. Finally, petitioners cite three district court cases in support of their argument that the plain language of Section 1821(e)(2) permits only a single repudiation period. *Rechler Partnership* v. *RTC*, No. 90-3091 (D.N.J. Sept. 4, 1990); *RTC* v. *United Trust Fund, Inc.*, 775 F. Supp. 1465 (S.D. Fla. 1991), appeal pending, No. 91-5922 (11th Cir.); *701 NPB Associates* v. *FDIC*, 779 F. Supp. 1336 (S.D. Fla. 1991). Their reliance on these decisions is misplaced. *Rechler* is inapposite because it did not address whether a receiver appointed to replace a conservator has an independent repudiation period. Rather, *Rechler* concerned whether, under the facts of that case, RTC as receiver of a failed thrift had repudiated a lease within a reasonable period.

Although *United Trust Fund* did address the question presented here, the court of appeals in the present case correctly declined to follow that decision. As the court of appeals recognized (Pet. App. 19a-21a), the conclusion in *United Trust Fund* that Section 1821(e)(2) grants RTC only a single "reasonable period" to repudiate a lease rested on the erroneous premise that there is no meaningful distinction between the roles of conservators and receivers. See 775 F. Supp. at 1468-1469. *701 NPB* provides no guidance here for the same reason; the court in *701 NPB* failed to consider the statutory distinctions between RTC's duties as conservator and its duties as receiver.

Moreover, neither *United Trust Fund* nor *701 NPB* analyzed the question presented here in any depth. The court in *United Trust Fund* devoted only one paragraph to the issue and cited only one decision —the district court's decision in the present case—to support its holding. 775 F. Supp. at 1468. Similarly,

the court in *701 NPB* disposed of the issue in a single paragraph and cited only *United Trust Fund*. See *701 NPB*, 779 F. Supp. at 1339. The bobtailed analyses in these decisions stand in sharp contrast to the lengthy and careful analysis of the court of appeals below. See Pet. 10a-23a.

3. Having determined that the language of Section 1821(e) was "less than crystalline" with respect to the question presented here, the court of appeals properly reviewed RTC's interpretation of that provision under *Chevron*, *supra*. In contending (Pet. 17-21) that RTC's interpretation was not entitled to deference, petitioners rely principally on this Court's decision in *Bowen* v. *Georgetown Univ. Hosp.*, 488 U.S. 204 (1988). Petitioners' reliance on that decision is misplaced.

In *Bowen* v. *Georgetown Univ. Hosp.*, this Court refused to accord deference to the Secretary of Health and Human Service's interpretation of a regulation because the interpretation was developed "only in the context" of that litigation and was "wholly unsupported by regulations, rulings, or administrative practice." 488 U.S. at 212. The Court accordingly followed its prior decisions "declin[ing] to give deference to an agency counsel's interpretation of a statute where the agency itself has articulated no position on the question." *Ibid.* The Court also observed that the interpretation advanced by the Secretary in that case was contrary to the interpretation he had advanced in prior cases. *Id.* at 212-213.

The present case does not involve an agency interpretation freshly minted for the instant litigation. On the contrary, RTC has always interpreted Section 1821(e) to permit it to repudiate a lease within a reasonable period after it has been appointed receiver of an insured institution, including in cases where

it has previously served as conservator of the institution. That interpretation is reflected not just in prior litigation but also in prior administrative practice, as shown by the facts of the present case and others in which RTC has repudiated a lease following its appointment as receiver for an institution that it has previously served as conservator. In this case, as was true in *Martin* v. *OSHRC*, 111 S. Ct. 1171, 1179 (1991), because the agency has definitively interpreted a statute in the course of administering that statute, its interpretation "*is* agency action, not a *post hoc* rationalization of it." Thus, RTC's interpretation is not merely a "convenient litigating position," but instead reflects consistent "administrative practice"; this Court's decision in *Bowen* v. *Georgetown Univ. Hosp.* is therefore inapposite. See 488 U.S. at 213.

Petitioners criticize the policy statement in which RTC has set forth its interpretation of Section 1821 (e) as insufficiently formal to warrant deference. See Pet. App. 105a-109a. That criticism is misguided. This Court made clear in *FDIC* v. *Philadelphia Gear Corp.*, 476 U.S. 426, 439 (1986), that a reviewing court may accord *Chevron* deference to an agency's interpretation of a statute, even if that interpretation "has not been reduced to a specific regulation," so long as the interpretation is manifested by the agency's consistent "practice and belief." Petitioners do not dispute that as a matter of agency practice RTC has consistently adhered to the interpretation of Section 1821(e) advanced here. That interpretation is therefore entitled to "considerable weight." *Philadelphia Gear*, 476 U.S. at 439 (quoting *Chevron*, 467 U.S. at 844); see also *Martin*, 111 S. Ct.

at 1179; *Whirlpool Corp.* v. *Marshall*, 445 U.S. 1, 11 (1980).[8]

4. The court of appeals correctly determined that Cedarminn's damages are limited to those prescribed in Section 1821(e)(4). Pet. App. 25a.[9] Petitioners nonetheless assert (Pet. 22) that the court of appeals should have addressed whether Sections 1821(e)(11) or (13) permitted them to retain the proceeds of the

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[8] Petitioners do not contend that, in issuing the policy statement, RTC either exceeded its authority under 12 U.S.C. 1441a(b)(12)(A) (Supp. II 1990) to "issue such rules, regulations, standards, policies, procedures, guidelines, and statements as [RTC] considers necessary or appropriate to carry out [its responsibilities]," or violated the Administrative Procedure Act, 5 U.S.C. 551 *et seq.* Instead, they complain about the absence of record evidence concerning the circumstances under which the policy statement was issued. Pet. 18-19. The policy statement was indisputably issued by RTC, 55 Fed. Reg. 14,368 (1990), and expressly addresses the repudiation powers granted by Section 1821(e). In any event, no evidence on this issue was presented in the district court because petitioners did not, at that stage, dispute that RTC had adopted the interpretation of Section 1821(e) that is at issue here; instead, the dispute in the district court centered on the validity of RTC's interpretation. Petitioners' further complaint (Pet. 18) that the policy statement was not reviewed by the RTC Oversight Board provides no reason for discounting the policy statement. Although RTC policies are indeed subject to review by the Board, nothing in 12 U.S.C. 1441a(b)(12)(B) (Supp. II 1990) requires Board approval before a policy statement may take effect.

[9] 12 U.S.C. 1821(e)(4) (Supp. II 1990) generally provides that "[i]f the conservator or receiver disaffirms or repudiates a lease under which the insured depository institution was the lessee, the conservator or receiver shall not be liable for any damages" other than contractual rent accruing through the effective date of the repudiation.

letters of credit. Neither provision, however, is implicated in this case.[10]

Section 1821(e)(13) protects extensions of credit by the Federal Home Loan Banks (FHLBs) to insured institutions, as well as certain security interests held by FHLBs, from the receiver's repudiation powers. That provision does not apply here. RTC as receiver did not repudiate the letters of credit issued by the FHLB, nor did it avoid any security interest held by the FHLB. To the contrary, the FHLB's security interest was fully satisfied.[11] Consequently, the court of appeals was not required to construe Section 1821(e)(13).[12]

Section 1821(e)(11)—which prohibits the RTC from using its repudiation powers to "avoid[]" any "legally enforceable or perfected security interest" in the assets of an insured institution—is also inapplicable on this record. Although petitioners now claim a "property interest" in the letters of credit and "Collaterally Assigned Mortgages" (Pet. 23), petitioners

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[10] Assuming *arguendo* that the court of appeals should have considered the applicability of Sections 1821(e)(11) and 1821(e)(13), the matter would appropriately be considered by the district court on remand rather than by this Court in the first instance. See, *e.g.*, *Brotherhood of Locomotive Firemen & Enginemen* v. *Bangor & Aroostook R.R.*, 389 U.S. 327, 328 (1967) (per curiam); *Hamilton-Brown Shoe Co.* v. *Wolf Bros. & Co.*, 240 U.S. 251, 258 (1916).

[11] Cedarminn drew on the letters of credit. The FHLB honored the draw, performed on the letters of credit, and converted the collateral supporting the letters ($11.8 million in cash supplied by the receiver of Midwest Savings) to its own account. See Pet. App. 65a.

[12] Indeed, the FHLB withdrew from the case in the district court with Cedarminn's consent and took no part in the appeal.

have not shown that they have any "legally enforceable or perfected security interest" in the assets of Midwest Federal or Midwest Savings. The only security interest connected with the letters of credit belonged not to petitioners, but to the FHLB and, as noted above, that security interest has been satisfied. The record did not evidence any legally enforceable or perfected security interest in the "Collaterally Assigned Mortgages." [13] The court of appeals therefore had no occasion to construe Section 1821(e)(11).[14]

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[13] Petitioners first alleged they had a security interest in the collaterally assigned mortgages in their reply brief in the court of appeals, where they cited portions of the leases with Midwest Federal calling for an assignment of mortgage collateral. No evidence was presented below, however, to show that those assignments were actually executed so as to create a "legally enforceable and perfected security interest." 12 U.S.C. 1821(e)(11).

[14] Moreover, even if Cedarminn's status as a beneficiary under the letters of credit could somehow be construed to grant it a security interest in the assets of Midwest Federal, that security interest has not been "avoided." To the extent that a valid claim against the security collateralizing a repudiated contract exists, Section 1821(e)(11) only requires that the receiver satisfy that secured claim to the extent of the collateral. Here, however, Cedarminn has no valid claim because Section 1821(e)(4)(B)(ii) precludes any claims under acceleration provisions in repudiated leases. Inasmuch as the claim underlying Cedarminn's demand for the proceeds of the letters of credit indisputably rests on such an acceleration clause, allowing Cedarminn to claim the proceeds pursuant to Section 1821(e)(11) would turn the statute on its head by allowing the amount of collateral to define the amount of the claim. Because the repudiation was proper, Cedarminn sustained no compensable damages under the lease agreements and could not have presented a proper draw on the letters of credit.

Assuming *arguendo* that Section 1821(e)(11) and (13) were implicated here, further review would nonetheless be unwarranted. Contrary to petitioners' assertion that there is "conflict and confusion among the district courts" concerning these provisions, Pet. 22, only two decisions, *First Nat'l Bank* v. *Unisys Fin. Corp.*, 779 F. Supp. 85 (N.D. Ill. 1991); *LB Credit Corp.* v. *RTC*, No. 91-C-4379 (ND. Ill. Aug. 10, 1992), have addressed the applicability of Section 1821(e)(11) in the present context. No district court has yet construed Section 1821(e)(13). Petitioners' reliance on *FDIC* v. *United States Trust Co.*, No. 92-10626-T (D. Mass. May 12, 1992), to establish a conflict is misplaced. In that case, the district court held that a court cannot enjoin a lessor from drawing on a letter of credit issued in connection with a repudiated lease. As we have explained, in the present case Cedarminn has already drawn on the letters of credit, and thus its right to do so is not at issue here.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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AUGUST 1992

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In The

Supreme Court of the United States

October Term, 1992

CEDARMINN BUILDING LIMITED PARTNERSHIP, MINNCEDAR LAND LIMITED PARTNERSHIP, ROCKMINN LEASING CORPORATION and MIDUNITED BUILDING COMPANY,

Petitioners,

vs.

RESOLUTION TRUST CORPORATION, as Receiver for Midwest Savings Association, F.A.,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

PETITIONERS' REPLY BRIEF

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APPENDIX

Reprint from Federal Register / Volume 55, No. 74, Page 14368 / Tuesday, April 17, 1990 / Notices 1a

No. 91-2059

In The

Supreme Court of the United States

October Term, 1992

CEDARMINN BUILDING LIMITED PARTNERSHIP, MINNCEDAR LAND LIMITED PARTNERSHIP, ROCKMINN LEASING CORPORATION and MIDUNITED BUILDING COMPANY,

Petitioners,

vs.

RESOLUTION TRUST CORPORATION, as Receiver for Midwest Savings Association, F.A.,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

PETTIONERS' REPLY BRIEF

Petitioners respectfully submit this Brief in reply to the Solicitor General's Brief in Opposition.

ARGUMENT

I. The Importance Of The Questions Presented

In its Brief in Opposition ("Opp."), the government seeks to minimize the importance of the questions presented in the Petition by noting that the statutory section at issue, 12 U.S.C. § 1821(e)(2), has been the subject of only four other reported District Court decisions. Opp. at 10. But the number of decisions has nothing to do with the importance of the questions. As the government argued in the Eighth Circuit, this case "presents an important question . . . because the answer will have enormous impact on federal receivership powers" (RTC's Eighth Circuit Brief at 1). In other words, the importance of this case lies in the fact that the answer given to the statutory issues in this case will have "enormous impact" on the countless leases and contracts entered into with hundreds of institutions involving billions of dollars "with importance well beyond this particular case" (*id.* at i, 7 and App. A). These issues thus create substantial problems in the administration of § 1821(e)(2).[1]

II. The Plain Meaning of Section 1821(e)(2)

A. The government argues that "the use of the disjunctive term 'or'" (Opp. at 11) in § 1821(e)(2) supports the RTC's interpretation of that section. However, the government's Brief in Opposition ignores the express disjunctive in the statute and argues that the statute should be construed in the *conjunctive*, by claiming that "the conservator *and* the receiver each has an independent power" to repudiate within a reasonable time (Opp. at 11) (emphasis added). Indeed, throughout its Brief the government consistently states its

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1. Indeed, the government noted in the Eighth Circuit that "[i]t is very likely that most, if not all of the remaining conservators will be ultimately replaced by receivers" who will then exercise repudiation powers over a vast number of leases and contracts (*id.* at i).

position in the *conjunctive* (Opp. at 7-11), directly contrary to the statutory disjunctive. The plain meaning of the statutory disjunctive "or" in Section 1821(e)(2) can only be that *either* the conservator *or* receiver for a financial institution, whichever is appointed, shall determine whether or not to repudiate within a reasonable period after appointment.

B. The government's reliance on the purported distinction between RTC's role as conservator and receiver is also misplaced. The undisputed record demonstrates that no such distinction was observed in this case, since FSLIC and the RTC as both conservators and receivers consistently were working to liquidate the institution regardless of the "hat" being worn. Indeed, the government's Brief in Opposition acknowledges that, at least as early as May 1989 — seventeen months before RTC's repudiation of the Leases at issue — FSLIC, and then RTC, were working "[t]o carry out the liquidation of Midwest" (Opp. at 3). Thus, the distinction which the government now seeks to draw between RTC's role as conservator and receiver simply elevates form over substance and ignores the undisputed facts of this case.

C. The government's Brief in Opposition also ignores the undisputed fact that the Leases at issue were repudiated by the *second* receiver, whose appointment followed the *second* conservator. Thus, the government argues not only that *both* a conservator *and* receiver may independently exercise the repudiation power, but that this power may be passed indefinitely to any number of subsequent conservators and receivers. This argument is unsupported by any reading of the plain language of § 1821(e).

D. Indeed, the government's theory of multiple, independent, renewable repudiation powers for any number of conservators and receivers would permit the RTC or FDIC, first as conservator, to repudiate within a reasonable period followed by a period during

which the repudiation power is expired. If, then, the RTC or FDIC replaces the conservator with a receiver, the repudiation power could be resuscitated for another reasonable period, followed by yet another period during which the power again expires. Upon appointment of a second, third or subsequent conservator or receiver, the "on again, off again" repudiation power would repeat itself. This anomalous result makes meaningless the "reasonable period" requirement in the statute, the plain meaning of which is to limit agency discretion and provide certainty and predictability.[2]

E. The government's attempt to distinguish FIRREA's statute of limitations provision, 12 U.S.C. § 1821(d)(14)(B) (Opp. at 13-14), misses the point. FIRREA's limitations provision is similar to the provision at issue (§ 1821(e)(2)) in that both provisions place temporal restrictions upon the discretion of the "conservator or receiver" specifying a period of time following appointment. Thus, consistency of meaning and interpretation should be presumed by this Court in this regard. *Patterson v. Shumate*, ___ U.S. ___, 112 S. Ct. 2242, 2247 n.2 (1992), *reh'g denied*, 1992 U.S. LEXIS 4781 (August 18, 1992). It is indisputable that, to permit multiple, independent, renewable limitations periods would render the statute of limitations provision meaningless, as the government concedes. It is also apparent that such a reading of the repudiation provision in § 1821(e)(2) would produce an equally untenable result.

III. The Inapplicability of *Chevron* Deference

A. The government contends that under *Chevron U.S.A., Inc. v. Natural Resources Defense Council*, 467 U.S. 837 (1984), an

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2. Notwithstanding the government's reassurance that RTC would not "disregard its statutory duties" in this manner (Opp. at 13 n.6), the RTC's interpretation of the statute would authorize the RTC and FDIC indefinitely to resuscitate the repudiation power.

agency's litigation position should be accorded *Chevron* deference simply because the agency consistently advances and adheres to that position (Opp. at 17). The government seeks to distinguish this Court's decision in *Bowen v. Georgetown University Hospital*, 488 U.S. 204 (1988), by relying on inapposite cases. Specifically, in *FDIC v. Philadelphia Gear Corporation*, 476 U.S. 426 (1986) (*see* Opp. at 17), this Court accorded *Chevron* deference to the FDIC's long-standing, fifty year old interpretation of the FDIC Act which, although not reduced to a specific regulation, had been consistently articulated and applied by the agency. The Court also observed that Congress had specifically noted, approved and preserved the FDIC's long-standing interpretation in several amendments to the FDIC Act. *Philadelphia Gear, supra*, at 431. None of the factors present in *Philadelphia Gear* exist in the present case, and, thus, the government's reliance upon *Philadelphia Gear* is misplaced.

Similarly, in *Martin v. Occupational Safety and Health Review Commission*, ___ U.S. ___, 111 S.Ct. 1171 (1991), also relied upon by the government (Opp. at 17), this Court held that *Chevron* deference could be accorded to a consistent agency intepretation established in formal, agency adjudicatory proceedings. In *Martin*, this Court held that an agency interpretation "*in an administrative adjudication*" is entitled to deference, given that the interpretation "assumes a form expressly provided for by Congress." *Martin, supra*, 112 S. Ct. at 1179. In the present case, the RTC's purported interpretation of § 1821(e) was not the product of any administrative adjudicatory proceeding. In this regard, the RTC's "interpretation" fails to meet the rule-making requirements set forth in the RTC's enabling statute, 12 U.S.C. § 1441a(b)(12) (Opp. at 18 n.8) and, thus, plainly does not "assume a form expressly provided for by Congress." Thus, rather than supporting the government's position, *Martin* undermines it.[3]

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3. The remaining cases cited by the government are inapposite. *Whirlpool Corp.*

(Cont'd)

B. Contrary to the government's suggestion, the record in this case establishes that the RTC never raised the issue of *Chevron* deference before the District Court, and did not argue or suggest in the District Court that there was a pre-existing agency interpretation on point. Nor had the RTC sought in other litigated cases to advance its purported "interpretation," although the issues before the district courts in those cases were substantially identical to those presented here (Opp. at 15). The sudden, after-the-fact appearance of the "Statement of Policy" to buttress its litigation position in the Court of Appeals thus underscores the *post hoc* nature of the RTC's "interpretation" which should be entitled to no deference under *Bowen v. Georgetown, supra*.

C. Petitioners do contend, and the government does not dispute, that the procedural requirements set forth in RTC's enabling statute (12 U.S.C. § 1441a(b)(12)) were not met in connection with the purported "Statement of Policy" unveiled by the RTC before the Eighth Circuit. Thus, although a "Notice of Adoption" of the Policy Statement was published in the Federal Register (*see* App. A hereto), the Statement itself was never published, and none of the other requirements of the Administrative Procedure Act were satisfied by the RTC as required by § 1441(b)(12). Nor was the Policy Statement ever submitted to the Oversight Board, also as required by the RTC's enabling statute, § 1441(b)(12).

D. Moreover, substantively, the RTC's proffered interpretation did not even purport to construe the statutory provision at issue (§1821(e)(2)), but rather dealt with wholly unrelated matters. In

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(Cont'd)

v. Marshall, 445 U.S. 1 (1980) (Opp. at 18) addressed the issue of deference (prior to *Chevron*) to a *formal regulation* duly promulgated by the Secretary of Labor (*id.* at 3). *American National Red Cross v. S.G.*, ___ U.S. ___, 112 S. Ct. 2465 (1992) (Opp. at 14), has nothing whatever to do with the *Chevron* issue.

this regard, the Notice of Adoption of the Policy Statement set forth in the Federal Register (*see* App. A hereto) cited for the first time in the government's Brief in Opposition (Opp. 18 n.18), provides no notice that the RTC had adopted any policy concerning repudiation powers under the statutory provision at issue, 12 U.S.C. § 1821(c).

CONCLUSION

For all the foregoing reasons, and for the reasons set forth in the Petition, certiorari should be granted on the questions presented.

Respectfully submitted,

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September 8, 1992

APPENDIX A - REPRINT FROM FEDERAL REGISTER/ VOL. 55, NO. 74, PAGE 14368/ TUESDAY, APRIL 17, 1990/ NOTICES

RESOLUTION TRUST CORPORATION

Notice of Adoption: Policy Statement Regarding the Payment of Interest on Direct Collateralized Obligations After Appointment of the Resolution Trust Corporation as Conservator or Receiver

SUMMARY: Notice is hereby given that on April 10, 1990, the Resolution Trust Corporation ("RTC") adopted a policy statement regarding the payment of interest on direct collateralized obligations after appointment of the RTC as conservator or receiver. Copies of the policy can be obtained from the RTC.

ADDRESSES: Copies of the policy can be obtained by writing to the Executive Secretary, Resolution Trust Corporation, 550 17th Street, N.W., Washington, DC 20429. Requests for copies may also be made to Phyllis Beard at (202) 898-3873.

FOR FURTHER INFORMATION CONTACT:

Rex Veal, Special Counsel, Resolution Trust Corporation (202) 416-2389.

Dated: at Washington, DC, this 10th day of April, 1990.

Resolution Trust Corporation.

John M. Buckley, Jr.,

Executive Secretary.

[FR Doc. 90-8894 Filed 4-15-90: 8:45 am]

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